No. 90-256-CFX
Status: GRANTED

Title: G. Russell Chambers, Petitioner
v.
NASCO, Inc.

Docketed:
August 2, 1990

Court: United States Court of Appeals
for the Fifth Circuit

Counsel for petitioner: Barham,Mack E.

Counsel for respondent: Scofield,John B., Cerf,Christopher D.

40 printed copies of pet. and sep. app. mailed 8/2 and recd. 8/6. Affid. of mlg. on file.

| Entry | Date | Note | Proceedings and Orders |
|---|---|---|---|
| 1 | Aug 2 1990 | G | Petition for writ of certiorari filed. |
| 2 | Aug 2 1990 | | Appendix of petitioner filed. |
| 4 | Sep 4 1990 | X | Brief of respondent NASCO, Inc. in opposition filed. |
| 3 | Sep 5 1990 | | DISTRIBUTED. September 24, 1990 |
| 5 | Oct 1 1990 | | Petition GRANTED. |
| | | | ******************************************************** |
| 6 | Oct 12 1990 | | Record filed. |
| | | * | Certified copy of original record, 25 volumes, 2 boxes, received. |
| 7 | Oct 19 1990 | | Record filed. |
| | | * | Certified copy of C.A. proceedings, 2 volumes, box, received. |
| 8 | Nov 15 1990 | | Joint appendix filed. |
| 9 | Nov 15 1990 | | (Joint Appendix in two volumes) |
| 10 | Nov 15 1990 | | Brief of petitioner G. Russell Chambers filed. |
| 12 | Nov 30 1990 | | Order extending time to file brief of respondent on the merits until December 28, 1990. |
| 13 | Dec 17 1990 | | SET FOR ARGUMENT WEDNESDAY, FEBRUARY 27, 1991. (2ND CASE) |
| 14 | Dec 28 1990 | | Brief of respondent NASCO, Inc. filed. |
| 15 | Jan 9 1991 | | CIRCULATED. |
| 16 | Jan 30 1991 | X | Reply brief of petitioner G. Russell Chambers filed. |
| 17 | Feb 27 1991 | | ARGUED. |

90-256
(1)

NO.



# In the Supreme Court of the United States

OCTOBER TERM, 1990

G. RUSSELL CHAMBERS
Petitioner,

v.

NASCO, INC.
Respondent.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

Plaintiff was awarded its entire attorney's fees in this diversity case—slightly over $1,000,000. Since the controlling state law provided no basis for the award, and in fact positively would not have allowed it, the award was granted under the "inherent power" of the court pursuant to the "bad faith" exception to the general American rule against fee shifting.

1. What, if any, is the scope of a federal court's "inherent power" to shift the entire burden of attorney's fees? Does it include the ability to shift fees in a diversity case in contravention of the law of the forum state?

2. If so, what are the limitations upon the exercise of this "inherent power?" For example, if the award is authorized as a "sanction," are the general requirements imposed upon an award of "sanctions," such as the prohibition against massive post-judgment retributive sanctions not reasonably tailored to the wrong sought to be redressed, operative? Can the award include reimbursement for expenses incurred before appellate courts and administrative agencies because of conduct not deemed "frivolous" by those higher courts or agencies? Can the award include reimbursement for fees incurred by a party who fails to mitigate his or her expenses? Does the general attorney's fees award requirement of "reasonableness" apply? Additionally, are due process requirements and the prohibition against excessive fines relevant?

## RULE 14(b) AND 29.2 STATEMENTS

The following persons and entities were parties below, but are neither petitioners nor respondents herein:

1. Calcasieu Television and Radio, Inc.
2. A.J. Gray, III
3. Edwin A. McCabe
4. Richard A. Curry
5. Mabel C. Baker

There are no parent or subsidiary companies of petitioner to be listed.



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**IN THE SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1990**

No.

G. RUSSELL CHAMBERS

v.

NASCO, INC.

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

G. Russell Chambers respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

## OPINIONS BELOW

The Opinion of the United States Fifth Circuit Court of Appeals (App., 59a-83a) is reported at 894 F.2d 696. The Opinion of the United States District Court for the Western District of Louisiana (App.,1a-58a) is reported at 124 F.R.D. 120.

## JURISDICTION

The Opinion of the United States Fifth Circuit Court of Appeals was rendered on February 6, 1990. A timely petition for rehearing was denied on May 4, 1990. (App., 84a-85a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eighth Amendment to the United States Constitution provides in full as follows:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

. . .nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

3. Section 1927 of Title 28 of the United States Code (28 U.S.C. § 1927) provides in full as follows:

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally such excess costs, expense, and attorneys' fees reasonably incurred because of such conduct.

4. Rule 11 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

## STATEMENT OF THE CASE

On August 9, 1983, NASCO, INC. ("NASCO") and Calcasieu Television and Radio, Inc. ("CTR") entered into an agreement (the "Purchase Agreement") to buy and sell



some of the assets used in the operation of KPLC-TV, the NBC affiliate in Lake Charles, LA, for $18,000,000. The Purchase Agreement was signed on behalf of CTR by its president, G. Russell Chambers ("Chambers"). When CTR refused to specifically perform, and instead offered to pay damages, NASCO filed suit in the United States District Court for the Western District of Louisiana requesting specific performance and damages. Jurisdiction was predicated upon the diversity of the citizenship of the plaintiff (NASCO) and the defendants (CTR and Chambers).

Following trial, CTR and Chambers were ordered to specifically perform the Purchase Agreement. *See* 623 F.Supp. 1372. The United States Court of Appeals for the Fifth Circuit issued a *per curiam* affirming the trial court, and finding that the appeal was frivolous under Federal Rule of Appellate Procedure 38. The Court fixed damages to be double costs, and the "appellee's attorneys' fees, if reasonable, expended in the prosecution of this appeal." Additionally, the Court of Appeals remanded "for a determination of whether sanctions in the form of costs and attorney's fees should be imposed against the appellants and/or their attorneys under Fed. R. Civ. P. 11 and against counsel for the appellants under 28 U.S.C. § 1927 as it relates to the proceedings in the district court." *See* 797 F.2d 975.

NASCO and CTR then closed the sale of the KPLC-TV assets, and settled a claim by NASCO for delay damages for $850,000. NASCO and CTR were prevented from settling a claim for attorney's fees because the trial court made it known that the matter of sanctions was its exclusive domain, and that it would not approve any such settlement.

Sixteen months following the Court of Appeals' remand, NASCO filed a Motion to Fix Compensatory Damages Pursuant to Contempt Judgment, to Fix Appellate Sanctions, and to Impose Sanctions. NASCO prayed that the court fix the amount of the sanction impos-

ed by the appellate court for the frivolous appeal. Additionally, NASCO went beyond the mandate of the appellate court and prayed that the trial court impose sanctions "including, but not limited to, all attorney's fees, expenses, and costs incurred by NASCO in these proceedings, and in the administrative proceedings before the F.C.C." Since neither Rule 11 nor 28 U.S.C. § 1927, the two bases for sanctions specified in the remand order by the Fifth Circuit Court of Appeals, were sufficient to authorize the trial court to grant the relief requested by NASCO, NASCO urged the trial court to award it all of its attorney's fees incurred in the entire proceeding under the "inherent power" of the court. Included as defendants were Chambers' attorneys, A. J. Gray, III and Edwin A. McCabe, Mabel C. Baker, Chambers' sister and another defendant, and her attorney, Richard A. Curry.

Following hearing, the trial court granted NASCO's motion, and sanctioned all parties named as defendants in NASCO's Motion. Mabel Baker was reprimanded; Gray was disbarred from the Western District of Louisiana, with no ability to reapply for admission for three years; McCabe was declared ineligible to practice in the Western District for five years; and Curry was suspended from practice in the Western District for six months. (App., 54a, 55a, 56a). Judgment was entered against Chambers personally in the sums of $66,286.65, representing the amount of the sanctions imposed by order of the United States Court of Appeals for the Fifth Circuit, and $996,644.65, representing the total attorney's fees and expenses incurred and paid by NASCO, Inc. in this matter. (App., 52a). Finding Rule 11 and 28 U.S.C. § 1927 inappropriate for its purposes, the trial court relied exclusively upon its "inherent power" in imposing these sanctions, including the award of attorney's fees. (App., 42a-47a).

The United States Court of Appeals for the Fifth Circuit affirmed. The court rejected Chambers' argument that the trial court did not possess the "inherent power" to



award attorney's fees because Louisiana law, the controlling law, did not allow such an award. Instead, the court found that federal courts always possess the "inherent power" to shift the full burden of attorney's fees in order to police against abusive litigation practices. (App., 72a-78a). The court also rejected Chambers' argument that the general rules governing sanctions, such as the requirements of swiftness, mitigation, and reasonable relation to wrong, should apply to the award. Instead, the court found that the existence of "vertical" powers, such as those granted to the courts by Rule 11 or 28 U.S.C. § 1927, does not constrain the courts from exercising "horizontal" powers, such as the "inherent power" to shift attorney's fees. (App., 69a-72a).

## REASONS FOR GRANTING THE PETITION

There is no dispute in this diversity case that the attorney's fee award is completely contrary to Louisiana law. Under *Alyeska Pipeline Services v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), and the unbroken chain of cases that have applied it faithfully without deviation, the Court of Appeals' job in this case should have been a simple one-- reversal of the sanction. Instead of following well established precedent, the Court of Appeals charted a bold new course for the federal courts, finding that there is an "inherent power" to shift the entire burden of attorney's fees in a case unrelated to the substantive award of attorney's fees permissible under the "bad faith" exception to the general American rule. The Court of Appeals held that the burden of attorney's fees can be shifted on procedural grounds to "vindicate the judicial authority of the court" and to "prevent abuses of the court's processes." There is absolutely no question that courts possess the inherent power *necessary* to accomplish these two aims. But, under all of the rules that govern sanctions, the massive post-judgment, retributive, untailored award made in this case does not qualify as a valid exercise of the court's inherent power. It serves no useful purpose

as a sanction, and acts only to chill legitimate zealous advocacy.

## A. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS CONFLICTS WITH DECISIONS OF THIS COURT, OF OTHER COURTS OF APPEALS, AND OF OTHER DECISIONS OF THE FIFTH CIRCUIT COURT OF APPEALS

The general American rule regarding attorney's fees is that each party shall bear his or her own, a rule which displaces any "roving authority" to assess attorney's fees "whenever the courts might deem them warranted." *Alyeska Pipeline Service Company v. Wilderness Society, supra,* 421 U.S. at 260, 95 S.Ct. at 1623. The circumstances under which attorney's fees are to be awarded "are matters for Congress to determine." Therefore, the "courts are not free to fashion drastic new rules" with respect to attorney's fees. *Id.,* 421 U.S. at 262, 269, 95 S.Ct. at 1624, 1627.

This is not to say that under certain "limited circumstances" federal courts do not possess the "inherent power" to award attorney's fees absent legislative authority. Fees may be shifted under certain guardedly circumscribed judicially recognized common law exceptions to the general American rule, one of which is upon a finding of bad faith, vexatious or oppressive conduct. *Id.,* at 421 U.S. 257-59, 95 S.Ct. at 1621-1623. Indeed, there have been many situations where this Court has recognized the "bad faith" exception, and has granted attorney's fees in federal question cases. *See, e.g., Roadway Express, Inc. v. Piper,* 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) (civil rights case); *F. D. Rich Company, Inc., v. United States for Use of Indus. Lumber Co., Inc.,* 417 U.S. 116, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974)(Miller Act case); *Hall v. Cole,* 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 1263 (1973)(LMRBA Case); *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968)(civil rights case); *Fleischmann Distilling Corp. v. Maier Brewing Company,* 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967)(LANHAM Act case);



*Vaughan v. Atkinson,* 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962)(admiralty case).

However, federal courts are not free to apply this common law exception in every case. As this Court noted when it first expounded upon the existence and nature of the "bad faith" exception:

> A very different situation is presented when a federal court sits in a diversity case. "[I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed."

*Alyeska Pipeline Service Company v. Wilderness Society, supra,* 441 U.S. at 259 n.31, 95 S.Ct. at 1622 n.31. The rationale has been explained thusly:

> [T]he same considerations which formed the foundation of *Hanna* and the line of cases following *Erie* would apply, of necessity, were a federal court to engraft federal notions of attorneys' fees awards onto state substantive rights tried in a diversity action. It is apparent that permitting an award of attorneys' fees in a federal court but denying them for an identical action brought in a state court would represent a significant reason to choose a federal forum. Even if we assume that this difference could be restricted to cases involving obdurate conduct or bad faith, it is clear that the possibility of such an award in many cases would color the substantive aspects of the case and could significantly alter the legal theories presented by the parties as a claim or defense. Under *Erie* and *Hanna,* such a federal shaping of the state substantive right is unwarranted.

*Ward & Company, Inc. v. Pacific Indemnity Company,* 557 F.2d 51, 58 n.9 (3rd Cir. 1977), citing *Hanna v. Plummer,* 380 U.S. 460, 471-72, 85 S.Ct. 1136, 1144, 14 L.Ed.2d 8 (1965) (emphasis added; footnote omitted).

Accordingly, with the sole exception of the case *sub judice,* the federal trial and appellate courts have consistently applied this Court's statement in *Alyeska,* and have held that in a diversity case, attorney's fees cannot be awarded on the basis of the court's inherent power under the "bad faith" exception unless that exception is recognized by the applicable state law. *See First State Underwriters Agency of New England Reinsurance Corp. v. Travelers,* 803 F.2d 1308, 1317 (3rd Cir. 1986), finding that Pennsylvania's "bad faith" exception governed the award of attorney's fees in a diversity contract action; *Nepera Chemical, Inc. v. Sea-Land Service, Inc.,* 794 F.2d 688 (D.C. Cir. 1986) applying District of Columbia law in a diversity action to determine whether attorney's fees could be awarded as punishment for bad faith, vexatious, wanton or oppressive behavior; *Amey, Inc. v. Gulf Abstract & Title, Inc.,* 758 F.2d 1486, 1508 (11th Cir. 1985), *cert. denied,* 476 U.S. 1153, 106 S.Ct. 2267, 90 L.Ed.2d 712 (1986), rejecting a claim for attorney's fees predicated upon the "bad faith" of the plaintiff in the way it "initiated and conducted" the litigation because the "bad faith exception is not recognized in the Florida jurisprudence;" *Barton v. Drummond Co.,* 636 F.2d 978, 985 (5th Cir. 1981), finding that federal law did not control the issue of whether attorney's fees were awardable for bad faith conduct in the course of, and prior to, the litigation because the case was a diversity action, but concluding that attorney's fees were authorized by Alabama Law; *Perkins State Bank v. Connolly,* 632 F.2d 1306, 1310, 1312 (5th Cir. 1980), holding that the inherent power of a federal court to shift fees under the "bad faith" exception does not supersede state law in a diversity case, and reversing an award of attorney's fees made under the "bad faith" exception because it was not authorized by Florida law; *Lewis v. S.L. & E., Inc.,* 629 F.2d 764, 773 n.21



(2d Cir. 1980), reversing an award of attorney's fees made on the basis of the "bad faith" exception because New York law did not authorize the award; *Montgomery Ward & Company, Inc. v. Pacific Indemnity Company, supra,* holding that attorney's fees could not be awarded under the "bad faith" exception unless that exception was recognized by Pennsylvania law; *Tryforos v. Icarian Development Company, S.A.,* 518 F.2d 1258 (7th Cir. 1975), *cert. denied,* 423 U.S. 1091, 96 S.Ct. 887, 47 L.Ed.2d 103 (1976), noting that the "unquestioned power" of a federal court to award counsel fees to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons could not be exercised by a federal court in a diversity case unless such an exercise is permitted by state law. *See also City of Philadelphia v. Fidelity and Deposit Company of Maryland,* 1987 WL 15432 (E.D. Pa. 1987), recognizing that Pennsylvania, not federal, law controlled on the question of whether attorney's fees could be awarded under the "bad faith" exception; *Miller v. Cudahy Company,* 656 F.Supp. 316, 336 (D.C. Kan. 1987), *aff'd in part,* 858 F.2d 1449 (10th Cir. 1988), recognizing that state law controlled the awardability of attorney's fees in diversity cases under the "bad faith" exception, but noting that Kansas had no rule of law on the subject; *Watson v. Ferguson,* 1986 WL 5202 (N.D. Ill. 1986), applying Illinois' statutory version of the "bad faith" exception because "a federal court sitting in diversity should apply state statutes" regarding attorney's fees; *William Shapiro v. American Home Assurance Company,* 1985 WL 3033 (E.D. Pa. 1985), examining Pennsylvania law for application of the "bad faith" exception because "as this is a diversity case, any award of attorney's fees must have a basis in the law of the relevant state;" *Brady v. Hartford Fire Insurance Company,* 610 F.Supp. 735 (D.C. Md. 1985), applying Maryland's version of the "bad faith" exception in a diversity case; *Friends of All Children, Inc. v. Lockheed Aircraft Corporation,* 587 F.Supp. 180, 188 (D.C.D.C. 1984), *aff'd,* 746 F.2d 816 (D.C. Cir. 1984), refusing to award attorney's fees under the "bad faith" excep-

tion because "jurisdiction in these cases is by diversity, . . . and the law of the District of Columbia does not now appear to permit an award of attorney's fees even under the extreme circumstances alleged here;" *P. Liedtka Trucking, Inc. v. James H. Hartman and Son, Inc.* 537 F. Supp. 381, 382 n.1 (E.D. Pa. 1982). *aff'd*, 709 F.2d 1491 (3rd Cir. 1983), applying the statutory version of the "bad faith" exception contained within Pennsylvania law because "where state law provides such a right, attorney's fees may be assessed by a federal court in a diversity case;" *Chicago Regional Fort District v. Ferroslag, Inc.*, 531 F.Supp. 401, 401-02 (N.D. Ill. 1982), holding that the court was not "free to exercise its 'inherent power' to tax a party with fees on the basis" of the bad faith exception because "Illinois not federal law provides the rule of decision;" *Bass v. Spitz*, 522 F.Supp. 1343, 1358 n.28 (E.D. Mich. 1981), rejecting a claim for attorney's fees for defense of a state law diversity claim made under the "state law counterpart of the 'bad faith' exception" because the court found "no Michigan statute or court rule which would authorize recovery of attorney's fees on this basis;" *McKinney v. Gannet Co., Inc.*, 660 F. Supp. 984, 1025 (D.C.N.M. 1981), *appeal dismissed*, 694 F.2d 1240 (10th Cir. 1982), refusing to award attorney's fees under the "bad faith" exception because it "has not been adopted in New Mexico."

In the instant case, there was no room for a finding, as was made in some of the cases cited above, that the "bad faith" exception was recognized and applied by the law of the forum state. The Court of Appeals correctly noted that Louisiana does not recognize the "bad faith" exception and steadfastly will not allow fee shifting in the absence of statute or contract, even through use of the "inherent power" of the court. (App., 67a). *See also Marvirazon Compania Naviera, S.A. v. H. J. Baker & Brothers, Inc.* 674 F.2d 364, 368 (5th Cir. 1982); *Quealy v. Paine, Webber, Jackson & Curtis, Inc.*, 475 So.2d 756, 763 (La. 1985). Louisiana does not award attorney's fees for "bad faith" breach of contract. *See Ogea v. Loffland Brothers Company*, 622 F.2d 186, 190 (5th Cir. 1980); *Rutherford v. Impson*, 366 So.2d 944, 947 (La. App. 1st Cir. 1978), *writ denied*, 369 So.2d 140 (La. 1979). The only measure of damages is "the loss sustained by the obligee and the profit of which he has been deprived." La. Civ. Code art. 1995 (1984). Moreover, the underlying rationale of the "bad faith" exception, which is punishment, *Hall v. Cole, supra*, 412 U.S. at 5, 93 S.Ct. at 1946, is inconsistent with Louisiana's prohibition of punitive damages. *Baggett v. Richardson*, 473 F.2d 863, 865 (5th Cir. 1973).



Given the wealth of authority on point, at every level of the federal judiciary from its very top to the bottom, the decision of the Court of Appeals should have been a preordained *per curiam* reversing the trial court's grant of attorney's fees under the "inherent power" of the court to shift fees under the "bad faith" exception to the general American rule. Every court that has ever considered the question has held that state law controls, and has either refused to shift fees because state law did not recognize the "bad faith" exception, or has shifted fees upon a finding that state law did recognize the "bad faith" exception. No court has ever shifted fees under the "bad faith" exception after an express finding that this exception was not recognized under the relevant state law.

But, with the comment that this Court "confused" the issue in *Alyeska*, the Court of Appeals, with no authority whatsoever,[1] dispensed with *Alyeska* and its mountainous progeny, upon a rumination that this Court did not

1. The Court of Appeals states that federal courts have not been "even in their treatment of the issue."(App., 73a) The *concurring* opinion by Judge Gibbon in *Montgomery Ward & Co., Inc. v. Pacific Indenmity Co., supra*, and the *magistrate's* opinion in *Republic of Cape Verde v. A & A Partners*, 89 F.R.D. 14 (S.D.N.Y. 1980), the only two cases cited by the Court of Appeals in support of its holding, hardly supply succor for this statement. Moreover both of these views are pure *dictum* because both Judge Gibbons and the magistrate preceded their ruminations with a finding that state law authorized an award of attorney's fees.

"intend" what it plainly said. (App., 67a-68a) But, the "plain meaning" of *Alyeska* is that state law governs attorney's fee awards in diversity actions, even in cases of bad faith litigation. *Montgomery Ward & Co., Inc. v. Pacific Indemnity Co., supra*, 557 F.2d at 56. If *Alyeska* "means" something else, that is a matter for this Court to declare, not for the Court of Appeals to speculate upon.

**B. THE DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS SETS BAD PRECEDENT IN THAT IT AUTHORIZES FEDERAL COURTS TO EXERCISE THEIR INHERENT POWERS IN A MANNER THAT IS BOTH UNNNECESSARY TO THE EFFECTIVE OPERATION OF THE COURTS AND CONTRARY TO THE PRINCIPLES THAT HAVE BEEN EXTABLISHED TO PREVENT THE IMPOSITION OF "SANCTIONS" FROM UNDULY CHILLING THE RIGHTS OF LITIGANTS TO ENGAGE IN LEGITIMATE ZEALOUS ADVOCACY.**

Finding no comfort for its decision in the "bad faith" exception to the general American rule against fee shifting as that exception has been recognized and applied by this Court and other federal courts in diversity cases, the Court of Appeals was forced to chart a bold new course for the federal courts. Without citation of authority, the court espoused the view, "nigh unchallenged in the history of the country, that federal courts have inherent power to police themselves by civil contempt, imposition of fines, the awarding of costs and the shifting of fees." (App., 68a). Given the existence of this reservoir of power, the court theorized that there is no barrier to fee shifting in a diversity case even if the shift is contrary to state law when it "is not a matter of substantive remedy, but of vindicating judicial authority." (App., 77a). In so holding, the Court of Appeals drew a substantive/procedural dichotomy with regard to awards of attorney's fees, and held that awards of fees made under a procedural mantle do not implicate the *Erie* doctrine because *Erie* does not require courts to "tolerate litigation abuses," or "limit the range of measures at the court's disposal to vindicate its authority." (App., 77a).



This holding is unprecedented, flawed and dangerous. No court has ever recognized that the power of a court to assess attorney's fees is contingent upon the *purpose* of the award.[2] The Court of Appeals' holding to that effect reflects a miscomprehension of the nature and purpose of the "inherent power" of the federal courts to shift fees. It unduly confuses the concept of a "sanction" with shifting the burden of attorney's fees, and allows a court to award the latter under the guise of the former. The ultimate effect is that the court's power to redress specific abuses of process becomes an instrument of retribution. Nothing is served. The ultimate goal of deterrence is sacrificed in favor of making the party injured by the other's bad faith whole, which has the ultimate effect of closing the courts by chilling what might otherwise be permissible zealous and legitimate advocacy.

1. It is beyond peradventure that federal courts possess certain "inherent powers." These are the powers that "are necessary to the exercise of all others," *Roadway Express, Inc. v. Piper, supra*, 447 U.S. at 764, 100 S.Ct. at 2463, that is, those "necessary to permit the courts to function." *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 819, 107 S.Ct. 2124, 2144, 95 L.Ed.2d 740 (1987) (Scalia, J., concurring). *citing United States v. Hudson*, 7 Cranch 32, 3 L.Ed. 259 (1812). These powers include the contempt power, *Cooke v. United States*, 267 U.S. 517, 539, 45 S.Ct. 390, 395, 69 L.Ed. 767 (1925), and the power to

[2] At least one court has expressly rejected such an argument. *See First State Underwriters Agency of New England Reinsurance Corporation v. Travelers Insurance Company, supra*, 803 F.2d at 1318 ("Whether categorized as primarily substantive or primarily procedural for purposes of conflicts analysis, the right to attorney's fees cannot be examined in a vacuum. Rather, the body of law regarding the resolution of the contract claims includes the right to attorney's fees and must be examined as a whole.")

dismiss a claim *sua sponte* for lack of prosecution, *Link v. Wabash Railroad Company,* 370 U.S. 626, 632, 82 S.Ct. 1386, 1389, 8 L.Ed.2d 734 (1962).

The "inherent powers" belong to three tiers: (1) irreducible inherent power that derives from Article III of the Constitution; (2) absolutely essential powers that arise from the nature of the court; and (3) powers that are necessary only in the sense of being useful. Powers of the first tier are available to the courts even in the face of contrary legislative direction. The second tier represents powers which can be legislatively regulated, but not abridged or abrogated. To the third tier belong powers which can be exercised only in the absence of contrary legislative direction — they exist at legislative whim. This last category is composed of powers that are necessary, but "necessary" only "in the practical sense of being useful." *See Eash v. Riggins Trucking Company,* 757 F.2d 557, 562-63 (3rd Cir. 1985) (en banc).

While this Court has not formally classified the "inherent powers," it has nonetheless made it clear that the power to shift attorney's fees is of the third tier. In *Alyeska Pipeline Company v. Wilderness Society, supra,* this Court expressly recognized that "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." 421 U.S. at 262, 95 S.Ct. at 1624. The "inherent power" to shift fees, such as under the "bad faith" exception, only exists "unless forbidden by Congress." 421 U.S. at 359, 95 S.Ct. 1622.

Given that the power to shift fees, even under the "bad faith" exception, is one that can be regulated by Congress, it is not surprising that it finds its source and purpose in something other than its own "necessity," as was found by the Court of Appeals. (App.,69_a).

> This third category of inherent powers has sometimes been said to be 'rooted in the notion that a federal court, sitting in equity, possesses all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion. . . . [S]uch power is necessary only in the sense of being highly useful in the pursuit of a just result.



*Eash v. Riggins Trucking Company, supra,* 757 F.2d at 563, *citing ITT Community Development Corporation v Barton,* 569 F.2d 1351, 1359 (5th Cir. 1978). The power can be traced to 17 Rich. II, c.6, which provided that the Chancellor should award damages (including costs) according to his discretion against persons bringing vexatious and unfounded suits in chancery. This power was thought to be "so far inherent in the equity court as to be inseparable from the exercise of its judicial authority." Therefore, "from the beginning" chancery courts were imbued with the "inherent power" to award fees for suits that were "false, unjust, vexatious, wanton, or oppressive." Battey, *Rule 11 Sanctions: Some Current Observations,* 33 S.D.L.R. 207, 207 & n.2 (1987-88), *citing Guardian Trust Co. v. Kansas City Southern Ry. Co.* 28 F.2d 233, 240-41 (8th Cir. 1921). The federal court's power to award attorney's fees for bad faith conduct "is part of the original authority of the chancellor to do equity in a particular situation. . . ." *Hall v. Cole, supra,* 412 U.S. at 5, 93 S.Ct. at 1946. *See also Alyeska Pipeline Services v. Wilderness Society,, supra,* 421 U.S. at 279-80, 421 U.S. at 1632-33 (Brennan, J. dissenting), *citing Vaughan v. Atkinson, supra.*

This historical background of the "bad faith" exception does not bode well for the Court of Appeals' contention that a federal court has the unbridled power to shift the entire burden of attorney's fees whenever it feels the need to vindicate its authority, or for some procedural purpose. Courts do not possess the "inherent power" to shift the entire burden of attorney's fees to achieve the procedural goal of vindicating their authority; they possess it to do equity

between the parties. If the former was the case, and punishment the objective, the Rules Enabling Act may well serve as a limit of the court's "inherent authority." *See* Untereiner *A Uniform Approach to Rule 11 Sanctions* 97 Yale L.J. 901, 908 at n.51 (1988) (questioning the authority of the judiciary to promulgate rules shifting fees for the purpose of punishment and compensation); Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11* 32 Vill. L.R. 575, 584 & n.28 (1987) (questioning whether the punishment of abusive lawyers is a proper procedural concern or within the authority granted by the Rules Enabling Act). If the latter was not the case, the court could shift fees whenever it felt the need to manage its docket or curb perceived abuses. But, it cannot. Even though courts possess the inherent powers "necessary to the exercise of all others," and to exert the "control necessarily vested in courts to manage their own affairs," such "inherent powers" are nonetheless limited by the general American rule, and the courts may only shift fees upon a finding of "bad faith," a "finding that would have to precede any sanction under the court's inherent powers." *Roadway Express, Inc. v. Piper, supra,* 447 U.S. at 767, 100 S.Ct. at 2465. *See also Tiedel v. Northwestern Michigan College,* 865 F.2d 88, 93 (6th Cir. 1988), holding that a court did not possess the "inherent power" to enact a local rule authorizing awards of attorney's fees as part of a pretrial mediation scheme because "awarding attorney's fees is not merely a matter of procedural or judicial efficiency," and therefore courts are *Alyeska* bound to follow legislative direction in the shifting of attorney's fees absent one of the judicially recognized exceptions.

2. The right of a federal court to shift the entire burden of attorney's fees on procedural grounds is not an inherent power. It is not among those powers necessary for the vindication of its judicial authority, much less "necessary for the exercise of all others," *Roadway Express, Inc. v. Piper, supra,* 447 U.S. 764, 100 S.Ct. 2463, or essential to "permit the courts to function." *Young v. United States ex rel. Vuitton et Fils, supra,* 481 U.S. at 819, 107 S.Ct. at 2144.



Courts do not need the ability to shift fees under the "bad faith" exception to function as a court or to exercise their other powers. In *Roadway Express, Inc. v. Piper, supra,* this Court did recognize that courts were possessed with the "inherent powers" that were "necessary to the exercise of all others" including the power, under the "bad faith" exception, to assess attorney's fees against counsel.[3] But, in the same opinion, this Court also held that attorney's fees could not be awarded under 28 U.S.C. § 1927, which authorized a court to tax "excess costs" against vexatious and obdurate lawyers. Since that time, 28 U.S.C. § 1927 has been amended to expressly authorize an award of "attorneys' fees reasonably incurred because of such conduct." Moreover,

> [s]anctions came into their own in the 1983 amendments to the Federal Rules of Civil Procedure. Explicit authority to award money sanctions, against lawyers as well as their clients, was written into rules 11, 16, and 26, and sanctions were made mandatory for violating rules 11 and 26.

Nelkin, *Sanctions under Amended Federal Rule 11 - Some "Chilling Problems" in the Struggle between Compensation and Punishment,* 74 Geo. L. J. 1313 (1986). These amendments filled the federal court's arsenal with a panoply of sanctions which may be levied for oppressive conduct short of a full shift of the entire burden of attorney's fees. *See* Fed. Rules Civ. Proc. 11, 16(f), 26(g), 30(g), 37(d), 37(g), 56(g). These provisions are more suited to protecting the

3. In *Roadway Express,* Justice Blackmun explicitly noted in concurrence that this Court did not "explore the specific features of [the "bad faith"] exception. Most significantly, it does not address the permissibility of applying this new exception to award attorney's fees beyond those actually attributable to the culpable attorney's vexatious actions." 447 U.S. at 769, 100 S.Ct. 2465.

court from abuse of its processes than a shifting of the burden of attorney's fees under the "bad faith" exception because "the key to avoiding abuse of the litigation process is early and effective judicial management." Schwarzer, *Sanctions Under the New Federal Rule 11 - a Closer Look*, 104 F.R.D. 181, 204. Moreover, 28 U.S.C. § 1927 authorizes awards of attorney's fees against a vexatious attorney. Thus, the inability of a court to utilize the "bad faith" exception to correct procedural abuses in a diversity case when not recognized by the law of the forum state "does not mean that the federal forums are to become a haven for the obdurate and the vexatious." *Montgomery Ward & Company, Inc. v. Pacific Indenmity Company, supra*, 557 F.2d at n.9.

In the case below, the trial court could not have found the need to impose the sanction of attorney's fees in order to vindicate its judicial authority. At the time the award at issue was finally made, fifteen months after a final decision on the merits, the court did not need vindication — its work was done, and it had not found the need to sanction anyone while that work was being accomplished, except for a single contempt citation. The record shows that the trial court was very well aware of its power to impose sanctions, and it found that use of this power was unnecessary. Warnings and the shaping of issues had been sufficient to police itself against abuse and vindicate its authority. It was only the mention by the Court of Appeals in its remand order of the possibility of sanctionable conduct that spurred the trial court to decide that sanctions were indeed in order. Then, it dredged up six years of conduct long under the bridge, and punished Chambers for all of it.[4] Given the course of this proceeding, it is difficult to

4. While Chambers is well aware that at this stage of the proceedings the issue is long foreclosed, he would be remiss at least to himself in not simply stating for the public record that he continues to steadfastly maintain that the scurrilous attacks on his character contained in the trial court opinion have absolutely no basis in fact.



understand the Court of Appeals' attempt to justify the award of attorney's fees made by the trial court under the "inherent power" of the court to "control its courtroom." (App., 77a). Having foregone use of the panoply of sanctions available to it to stop the abuses that it perceived were occurring during the course of the litigation, it is less than clear how the trial court's imposition of the $1,000,000 "sanction" of NASCO's full breath of attorney's fees was a matter of the strict "functional necessity" that the Court of Appeals found is at the heart of a court's "inherent powers."(App., 69a).

3. In fact, the award made in this case is at cross purposes with the proper exercise of a court's inherent power to manage its own docket, promote efficiency, and deter abuses of process. The massive post-judgment, untailored and unfocused aspects of the award made in this case render it both inappropriate and dangerous as a "sanction" imposed under the "inherent powers" of a court.

A distinction is to be drawn between the imposition of a "sanction" that requires a party to reimburse those attorney's fees attributable to some conduct below an appropriate standard, and the shifting of the entire burden of attorney's fees for the purpose of making the injured party whole. Sanction rules, such as Rule 11, "are not fee shifting statutes." *Cooter & Gell v. Hartmarx Corporation*, __U.S.__, 110 S.Ct. 2447, 2462, 58 USLW 4763 (1990). Their purpose is "not reimbursement, but sanction." *Pavelic & LeFlore v. Marvel Entertainment Group*, __U.S.__, 110 S.Ct. 456, 459, 58 USLW 4038 (1989), The line between the two may not always be clear. *See Oliveri v. Thompson*, 803 F.2d 1265, 1271 (2d Cir. 1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987)("There is no clear line between attorney's fees as damages and attorney's fees as sanctions.") Nonetheless,

there are characteristics that distinguish a "sanction" from a shift of attorney's fees.[5]

A primary distinction is a question of timing:

> It is a precept that sanctions must be imposed within a time frame that has a nexus to the behavior sought to be deterred.... Sanctions should not amount to an 'accumulation of all perceived misconduct, from filing through trial,' resulting in 'single post-judgment retribution in the form of a massive sanctions award.' The most obvious defect in this procedure is that it flies in the face of the primary purpose of sanctions, which is to deter subsequent abuses. This policy is not well served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end.

*Thomas v. Captial Security Services, Inc.*, 836 F.2d 866, 881 (5th Cir. 1988) (en banc), *citing In re Yagman*, 796 F.2d 1165, 1183 (9th Cir. 1986), *cert. denied*, __U.S.__, 108 S.Ct. 450, 98 L.Ed.2d 390 (1987). "Early notice can deter continuing violations, thereby saving monetary and judicial resources." *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987).

> A proper sanction assessed at the time of a transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant santions. Such prompt action helps enhance the credibility of the rule, and, by deterring further abuse, achieve its therapeutic purpose.

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[5] While many of the observations that follow were made with regard to sanctions under Federal Rule of Civil Procedure 11, there is no reason why their compelling logic is not applicable to any sanction of attorney's fees imposed for the purpose of vindicating judicial authority or policing against litigation abuses. *See. e.g. Smith International, Inc. v. Texas Commerce Bank*, 844 F.2d 1193 (5th Cir. 1988), adopting the Rule 11 limitations for sanctions imposed under the authority of 28 U.S.C. §1927 for "bad faith" conduct by attorneys.



*In re Yagman, supra*, 796 F.2d at 1183.

An unusually large post-judgment "sanction" is a sure sign of the failure of the sanctioning process to achieve deterrence, and of monetary and judicial waste. "If enforcement of the rule occurs expeditiously before much damage is done, . . monetary sanctions will ordinarily be modest." Schwarzer, *supra*, 104 F.R.D. at 203. But, when "abuses are allowed to pass unchecked, and, thus, undeterred," attorney's fees begin to accumulate. As a consequence, the court is "left faced with an unusually large sanctions amount that will, contrary to the policy, impart absolutely no deterrent value." The efficiency achieved by waiting to assess "sanctions" at the conclusion of the litigation is "paid for in wasted judicial resources and money." *In re Yagman, supra*, 796 F.2d at 1183.

The second precept of sanctions is that, in order to achieve their educational and rehabilitative purpose, sanctions should be "tailored to the particular wrong." *Thomas v. Captial Security Services Inc., supra*, 836 F.2d at 877. Attorney's fees, when awarded as a sanction, "ordinarily will not include compensation for the entire case." *Mary Ann Pensiero, Inc. v. Lingle*, 847 F.2d 90, 99 (3rd Cir. 1988). The fees awarded must have been "reasonably incurred as a result of the violation." *Willy v. Coastal Corp.*, 855 F.2d 1160 (5th Cir. 1988). "It is crucial that a sanctions award be quantifiable with some precision and properly itemized in terms of the perceived misconduct and the sanctioning authority." *Brown v. Federation of State Medical Boards*, 830 F.2d 1429, 1438 (7th Cir. 1987); *In re Yagman, supra*, 796 F.2d at 1184.

The requirement that sanctions be limited to those necessary to redress the wrongful conduct is natural for those imposed under the "inherent powers" of the court because the "traditional equitable authority" of the federal court extends "no farther than required by the nature and extent" of the violation that prompts its exercise. *General Building Contractors Association, Inc. v. Pennsylvania*,

458 U.S. 375, 398, 102 S.Ct. 3141, 3154, 73 L.Ed.2d 835 (1982), *citing Milliken v. Bradley*, 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977). It would also seem to be a natural corollary to the principle that, because "inherent powers" are "shielded from direct democratic controls, they must be exercised with restraint and discretion." *Roadway Express, Inc. v. Piper, supra*, 447 U.S. at 764, 100 S.Ct. at 2463, *citing Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 450-451, 31 S.Ct. 492, 501-502, 55 L.Ed. 797 (1911). *See also* 6 Moore, Taggart, and Wicker, *Moore's Federal Practice* §54.78 [3] 54-508 (2d Ed. 1988), noting that courts possess the "inherent power" to award attorney's fees "made necessary by the unjustified conduct."

Three policies are fostered by requiring that sanctions be tailored to the wrong: (1) the educational purpose of the sanction is enhanced by letting judges pinpoint the abusive acts; (2) the deterrent effect is increased by making the imposition of the penalty for each infraction more certain; and (3) the possibility of abuse is reduced by eliminating the likelihood that a party will run up unreasonable costs and then petition for their reimbursement at the conclusion of the litigation. *St. Amant v. Bernard*, 859 F.2d 379, 382 n.12 (5th Cir. 1988).[6]

There is an additional reason why sanctions should be carefully tailored to the offense. While this Court has held that punitive damage awards are not subject to the Eighth Amendment's prohibition against "excessive

[6] Several courts have held that even under the "bad faith" exception, which is a fee shifting rule, fees that have no relation to the complained of conduct should be excluded from the award. *Marshall v. Perez Arzuaga*, 828 F.2d 845, 852-53 (1st Cir. 1987), *cert denied*, 484 U.S. 1065, 108 S.Ct. 1027, 98 L.Ed.2d 991 (1987); *Sierra Club v. U.S. Army Corps of Engineers*, 776 F.2d 383 (2d Cir. 1985) *cert. denied*, 475 U.S. 1084, 106 S.Ct. 1464 (1986); *Lipsig v. National Student Marketing Corporation*, 663 F.2d 178, 181 n.21 (D.C. Cir. 1980); *Richardson v. Commercial Workers of America*, 530 F.2d 126, 133 (8th Cir. 1976), *cert. denied*, 429 U.S. 824, 97 S.Ct. 77 (1976); *Grunin v. International House of Pancakes*, 513 F.2d 114, 127-29 (8th Cir. 1975) *cert. denied*, 423 U.S. 864, 96 S. Ct. 124 (1975).



fines," in so doing it noted that the Excessive Fines Clause does prohibit the imposition of "excessive monetary sanctions." *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, __U.S.__, 109 S.Ct. 2909, 2920, 106 L.Ed.2d 219 (1989). In addition, this Court expressly left open the possibility that the Due Process Clause of the Fourteenth Amendment may place an outer limit on the size of a punitive damage award. *Id.*, at 2921, *citing Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. 71, 86, 108 S.Ct. 1645, 1654, 100 L.Ed.2d 62 (1988) (O'Connor, J., concurring). In the context of sanctions, it has been noted that, to avoid the possibility that the sanction will in effect constitute a criminal fine, requiring extensive due process safeguards, the sanction should be limited to "consequential expenses and attorney's fees., i.e., those incurred 'because' of the paper filed in violation." Schwarzer, *supra*, 104 F.R.D. at 2-2-203, *See also Donaldson v. Clark, supra*, 819 F.2d at 1559 n.10, 1561 ("It may be that the monetary sanction being considered in a specific case is so severe in amount or so arguably unrelated to the misconduct that due process will require extensive due process safegards as prerequisites to its imposition. . . . The more serious the possible sanction both in absolute size and in relation to actual expenditures, the more process that will be due."); *In re Yagman, supra*, 796 F.2d at 1880 ("If the amount of the sanction imposed is grossly disproportionate to the attorney's misconduct, or otherwise falls outside the bounds of the authority for the sanction, then the court should be cognizant of the possibility of a latent fine.") *See also Ray A. Scharer and Company, Inc., v. Plabell Rubber Products, Inc.*, 858 F.2d 317, 321 (6th Cir. 1988).

The third precept of sanctions is the "mitigation principle," limiting recovery to "those expenses and fees that were reasonably necessary to resist the offending paper." Schwarzer, *supra*, 104 F.R.D. at 198, *See also Napier v. Thirty or More Unidentified Federal Agents*, 855 F.2d 1080, 1092 (3rd Cir. 1988); *Dubisky v. Owens*, 849 F.2d 1034, 1037 (7th Cir. 1988); *Thomas v. Capital Security*

*Services, Inc. supra*, 836 F.2d at 880; *Brown v. Federation of State Medical Boards, supra*, 830 F.2d at 1439; *In re Yagman, supra*, 796 F.2d at 1184. Mitigation is required to further the deterrent effect of the sanction. The sanction's purpose "would be frustrated if it encouraged the offended party to play the very game at which it is aimed." Schwarzer, *supra*, 104 F.R.D. at 201.

Finally, a true sanction should not be imposed by a court for conduct that does not occur before that court. For example, a trial court should not impose sanctions for a frivolous appeal or writs. *Sierra Club v. U.S. Army Corps of Engineers, supra*, 776 F.2d at 392; *Roth v. Pritikin*, 787 F.2d 54, 58-59 (2d Cir. 1986). "A rule permitting a district court to sanction an attorney for appealing an adverse ruling might deter even a courageous lawyer from seeking the reversal of a district court decision." *Emergency Beacon Corporation v. Montmartco, Inc.*, 790 F.2d 285 (2d Cir. 1986). This Court has recently recognized that, at least as far as sanctions are concerned, Federal Rules of Appellate Procedure 38 places "a natural limit on Rule 11's scope" because "the knowledge that, after an unsuccessful appeal of a Rule 11 sanction, the district court that originally imposed the sanction would also decide whether the appellant should pay his opponent's attorney's fee would be likely to chill all but the bravest litigants from taking an appeal." *Cooter & Gell v. Hartmarx Corporation, supra*, 110 S.Ct. at 2462. At least one court has applied the same principle to attorney's fees awards made under the "bad faith" exception. *See Morris by Rector v. Peterson*, 871 F.2d 948 (10th Cir. 1989).

The attorney's fees award approved by the Court of Appeals cannot by any stretch be viewed as an exercise of the court's "inherent power" to sanction litigants who abuse its processes because the award does not possess any of the characteristics of a sanction. To begin with, the award was made over sixteen months following the final determination of the merits of the litigation. No "sanctions" of attorney's fees were imposed during the entire six



year course of the case, while all of the perceived wrongs of discovery abuses, frivolous pleadings, unjustified requests for delay, etc. were occurring. Instead of exercising the powers that could hold this conduct in check, the trial court merely gave warnings that sanctions were available. But, a distinction is to be drawn between "the general notice about sanctions and notice that santions are being considered." *Tom Growney Equipment, Inc. v. Shelly Irrigation Development, Inc.*, 834 F.2d 833, 836 n.5 (9th Cir. 1987). The continued issuance of "warnings" without the actual imposition of sanctions could only have a salutary effect, leading the parties to believe that their conduct had not transgressed the permissible bounds. "Misconduct, once tolerated, will breed more misconduct." Schwarzer, *supra*, 104 F.R.D. at 205. Accordingly, the timing of the attorney's fee award prevented it from having any deterrent effect in this case. The sanctions award which was not requested or granted until long after the conclusion of this litigation, is far "more retaliatory than substantive in nature." *Stevens v. Lawyers Mutual Liberty Insurance Company* 789 F.2d 1056, 1061 (4th Cir. 1986).

Nor is the attorney's fee award closely tailored to the perceived wrong. The "sanction" levied in this case contemplates reimbursement of every penny incurred by NASCO from drafting the complaint forward, including, incredibly, the closing costs incurred by NASCO — costs that the Purchase Agreement explicitly allocated to NASCO![7] It includes every penny expended by NASCO answering every pleading filed by CTR, even though the trial court explicitly found that "there was some legal basis for some of the defenses" asserted. (App., 33a). Such "round figuring" upon a mere finding that substantially all of NASCO's fees were attributable to CTR's wrongful conduct is "unsound" as a sanction because it does not allow for a comparison of the sanctions imposed and the perceived wrongful conduct. *In re Yagman, supra, 796 F.2d*

[7] Those costs were not insubstantial. One of the numerous law firms that represented NASCO alone billed $80,341.34 for the closing.

at 1165.

The attorney's fees could not have been tailored in this case. The proof of attorney's fees consisted of nothing more than invoices that reflected a whole month's worth of work at one time, with a single narrative describing the entire office effort. No breakdown was made of the time expended on any particular task, the cost or fee associated with that task, or even the person performing that task. There was simply no way for the trial court to determine whether the fees incurred by NASCO were "reasonable," as has been required by the landmark case of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), expressly adopted by this court in *Hensley v. Exkerhart*, 461 U.S. 424, 429, 103 S.Ct. 1933, 1937, 76 L.Ed.2d 40 (1983), or whether they were attributable to any wrongdoing. *See also Sidag Aktiengesellschaft v. Smoked Foods Products Company, Inc.*, 854 F.2d 799, 801 (5th Cir. 1988), expressly holding that the *Johnson* requirement applies to attorney's fees awarded under the "bad faith" exception.

No deduction was made in the attorney's fee award for NASCO's failure to mitigate its expenses. NASCO litigated for six years and did absolutely nothing to obtain a summary disposition of this case in the face of a single defense that the Court of Appeals found so frivolous as to merit a *per curiam* affirmance issued from the bench at oral argument and the immediate imposition of sanctions. Instead of hurrying this case along, NASCO filed endless motions and memoranda. "Clearly frivolous litigation may be rebutted quite simply without a flurry of documents." *Brown v. Federation of State Medical Boards, supra*, 830 F.2d at 1439. "If a baseless claim could have been readily disposed of by summary procedures, there is little justification for a claim for attorney's fees and expenses engendered in lengthy and elaborate proceedings in opposition." Schwarzer, *supra*, 104 F.R.D. at 201.



Nor does the sanction imposed by the trial court confine itself to conduct occurring before the trial court. The fine includes amounts incurred by NASCO before the Court of Appeals on writs and in prior appeals, before this Court on a request for stay, and before the Federal Communications Commission during administrative proceedings involving transfer of KPLC's license, all of which the trial court deemed to be frivolous.

The sheer size of the award made in this case, coupled with its failure to bear any relation to the amount of attorney's fees incurred by NASCO attributable to the wrongful conduct, raises Eighth and Fourteenth Amendment concerns. "The extraordinarily large assessment of expenses in this case appears to be unreasonable on its face." *Batson v. Neal Spelce Associates, Inc.*, 765 F.2d 511, 516 (5th Cir. 1985). *See also In Re: Yagman, supra* ("$250,000 is a remarkably large monetary sanction—large enough to raise immediate suspicion.")

In short, the fee shift awarded in this case is the antithesis of a proper exercise of the court's power to prevent abuse of its process. Yet, the Court of Appeals has found a reservoir of "inherent power" to impose the award, even though it is contrary to the substantive law that controls this case and serves no valid procedural purpose. This sets a dangerous precedent.

> Fairnness to litigants who suffer from abuse, and others in the case load queue, depends in large part upon reducing the reluctance of lawyers to seek and judges to impose sanctions in proper circumstances. At the same time, we embrace the fact that zealous advocacy is the attorney's ideal. Hard-fought, energetic and honest representation is at the bedrock of our judicial process. None of the various rules and statutes that authorize sanctions are intended, nor should they be implemented, "to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."

> The line between these equally important concerns is necessarily vague. Each case must be taken individually and evaluated in light of its own peculiar circumstances. If sanctions are warranted by those circumstances, the court must be meticulously aware that this precarious balance can only be maintained if the sanctions are justly imposed. This means foremost that the conduct in question must in fact be sanctionable under the authority relied upon. It also means that the amount of the sanctions and the manner in which they are imposed cannot be inconsistent with the purpose and directive of the authority on which the sanctions are based. [Sanctions] that do not fall within these guidelines . . . pose a direct threat to the balance between sanctioning improper behavior and chilling vigorous advocacy.

*In re Yagman, supra,* 796 F.2d at 1182-83.

There is no "inherent power" to shift the burden of attorney's fees, and to do away with the general American rule, on "procedural grounds." Such a power is not "necessary for the exercise of all other powers." *Roadway Express, Inc. v. Piper, supra,* 447 U.S. at 764, 100 S.Ct. at 2463. An attorney's fee award that does not reflect the careful tailoring that marks a "sanction" is, by its nature, an award of damages, implicating substantive law. It has no value as a sanction. As a device to "vindicate judicial authority," it is purely retributive. And,

> to allow punishment to take the form of such a generic, all-encompassing, massive, post-trial retribution, with no indication whatsoever of its reasonableness, would send shivers through the bar.

*In re Yagman, supra,* 796 F.2d at 1185.



## IX. CONCLUSION

G. Russell Chambers' petition for a writ of certiorari should be granted.

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August 2, 1990

90-256

NO. (2)



# In the
# Supreme Court of the United States

OCTOBER TERM, 1990

G. RUSSELL CHAMBERS
Petitioner,

v.

NASCO, INC.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## APPENDIX

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## APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR

THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

FILED
JAN 23 1989

| | | |
|---|---|---|
| NASCO, INC. | : | CIVIL ACTION |
| -vs- | : | NO. 83-2564 |
| CALCASIEU TELEVISION AND RADIO, INC., ET AL | : | JUDGE SCOTT |

## OPINION

**This matter is before us on a Motion to Fix Compensatory Damages Pursuant to Contempt Judgment, To Fix Appellate Sanctions, and To Impose Santions.[1] The mover is NASCO, Inc. (NASCO). The respondents include G. Russell Chambers (Chambers), A. J. Gray, III (Gray), Edwin A. McCabe (McCabe), Mabel Christine Baker (Baker), and Richard A. Curry (Curry).**

[1] By order dated Fegruary 1, 1988, we fixed the contempt damages previously awarded to NASCO in the amount of $6,233.27, together with legal interest thereon at the rate of 7.14% per annum from February 1, 1988, until paid. (The $6,233.27 amount includes $4,754.00 in attorney's fees and expenses and $1,479.27 in out-of-pocket expenses incurred by NASCO's director James Smith in testifying at the contempt hearing). That issue is therefore not addressed herein.

Nasco filed this action in diversity on October 17, 1983 for the specific enforcement of an August 9, 1983 Purchase Agreement providing for the sale of television station KPLC-TV in Lake Charles, Louisiana to NASCO and for injunctive relief to prohibit the transfer of the properties to any third party in violation of the Purchase Agreement. Due notice of NASCO's application for injunctive relief was given to the attorneys for sellers prior to Sunday, October 16, 1983, and sellers on that day created a trust and transferred properties to the trust in violation of the Purchase Agreement and for the admitted purpose of placing these properties beyond the jurisdiction of this Court. The defendants in the underlying action are Calcasieu Television and Radio, Inc. (CTR),[2] the owner and defaulting seller; Chambers, the sole shareholder and sole Director of CTR, who signed the Purchase Agreement on behalf of CTR and in his individual capacity, and who caused the corporation to breach the Agreement; and Baker, Chambers' sister and the Trustee of the Facility Trust, an entity created by Chambers on the eve of this litigation to receive simulated ownership of certain station properties in order to prevent judicial enforcement of the sale.

The litigation was tried to the Court without a jury on April 17, 1985. NASCO prevailed.[3] This Court's refusal to stay execution of the judgment pending appeal was sustained by the Appellate Court.

2. Calcasieu Television and Radio, Inc. (CTR), an original defendant in the underlying litigation, was liquidated following the sale of KPLC-TV to NASCO. It is thus not a respondent in the instant matter.

3. This Court issued its Opinion on the merits on November 8, 1985, *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 623 F. Supp. 1372 (W.D.La. 1985), and Judgment was signed on November 27, 1985.



On August 6, 1986, the United States Court of Appeals for the Fifth Circuit, at the close of oral argument, ruled from the bench, *per curiam*, affirming this Court's judgment on the merits, declaring the defendants' appeals to be frivolous, imposing appellate sanctions against Chambers and Baker pursuant to Fed. R. App. P. 38 in the form of attorney's fees and double costs, and remanding the case with instructions to fix the amount of the appellate sanctions and to determine whether further sanctions should be imposed against the defendants and/or their counsel for the manner in which the litigation was conducted in the district court.[4]

Continued resistance by Chambers, his employees and agents, including McCabe after our November 27, 1985 judgment on the merits, delayed completion of the sale until August 27, 1986. Thereafter NASCO's claims for damages under La. C.C. Art. 1986 (specific performance) as a result of Chambers' breach of the agreement were disposed of before NASCO could prepare and file, on December 29, 1987, the motion now before us, first, to fix the amount of the appellate santions imposed against Chambers and Baker by the Fifth Circuit, and, second, to impose appropriate sanctions against the respondents, including Chambers, Gray, McCabe, Baker, and Curry, for the manner in which the defense of this action was conducted in the trial court. NASCO seeks *appropriate* sanctions — including all attorney's fees, costs, and expenses it incurred during the course of the entire proceedings. These sanctions are sought under the aegis of the Court's inherent equitable

4. *See NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, No. 86-4003 (5th Cir. Aug. 6, 1986) (*per curiam*) (unpublished order); *Id.* (5th Cir. Aug. 11, 1986) (*per curiam*) (unpublished order amending Order of Aug. 6, 1986); *Id.* (5th Cir. August 27, 1986) (*per curiam*) (unpublished opinion affirming judgment on the merits).

powers, and the provisions of 28 U.S.C. § 1927 and Fed. R. Civ. P. 11.

An evidentiary hearing was held on April 11, 1988. Suggested findings and conclusions as well as authorities (including additional authorities requested by us on December 12, 1988) have been submitted by all parties and are now before us.

## ISSUES

The issues before the Court are as follows:

A. Fixing the amount of attorney's fees and of double court costs on appeal decreed as sanctions by the Court of Appeals.

B. Determining whether sanctions are appropriate for the manner in which this proceeding was conducted in the district court from October 14, 1983, the time that plaintiff gave notice of its intention to file suit to this date and, if sanctions are appropriate, to determine what party or parties should be sanctioned and the character of sanctions to be assessed.

## FINDINGS OF FACT

A. *Preliminary History:*

1. On August 9, 1983, NASCO, as buyer, and CTR and Chambers, as sellers, entered into an Agreement to convey the television facilities and the broadcast license of KPLC-TV in Lake Charles, Louisiana for the purchase price of $18 million dollars. The Agreement has never been recorded in Calcasieu and Jefferson Davis Parishes where the properties are located.



2. The Agreement provided that time is of the essence in the performance of the Agreement, Paragraph 31, and provided specifically that consummation of the Agreement is subject to the approval of the Federal Communications Commission; that the parties shall proceed as expeditiously as possible to file all requisite applications and other necessary instruments, to process said applications with all reasonable diligence and to cooperate and use their best efforts to obtain the requisite consent and approval of the Commission and to carry out the provisions of the Agreement. In no event was the joint application to the Commission to be filed later than forty-five days from the date of the Agreement, namely September 23, 1983.

Chambers, the sole stockholder and sole member of the Board of CTR, and his attorney, Jonathan Golden, who was also assistant secretary of CTR, negotiated and consummated the Agreement on behalf of CTR. In fact, they were the only CTR employees or representatives having knowledge of the existence of the Agreement until Chambers' meeting with NASCO representatives in Lake Charles, Louisiana on August 22, 1983.

3. On that date, Brian Byrnes and Jim Smith, who signed the Agreement on behalf of NASCO, visited KPLC-TV at the invitation of Chambers for the purpose of drafting an appropriate public announcement of the Agreement. Until he left the meeting, Chambers had been most cooperative in carrying out the Agreement.

Rita Guillory,[5] President of CTR, had no part in the negotiations and was not consulted regarding the Agreement. At this meeting she learned for the first time that

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5. Rita Guillory became Rita Chambers after her marriage to G. Russell Chambers on or about November 1983.

KPLC-TV was to be sold and that she would lose her job as President. CTR's cooperation ceased the minute that Chambers left the meeting. Byrnes and Smith left and no representatives of NASCO would be present at the station again until sometime after September 23, 1983.

4. Chambers called Bill Cook, chairman of NASCO, on August 29, 1983 and tried to talk him out of going through with the Agreement, offered to reimburse all of NASCO's expenses and pay some additional money. Cook declined.

5. On September 2, 1983, NASCO informed CTR and Chambers that NASCO's portion of the Assignment Application was ready and in suitable form for filing with the FCC.

6. On or about September 7, 1983, Chambers had a telephone conversation with Brian Byrnes in which he asked "What would you say if I didn't file?" Byrnes replied that NASCO had been ready to file its portion of the FCC application since September 1 or 2, and that he would be very disappointed.

7. Byrnes and Chambers spoke again on Monday, September 12, 1983. When Chambers asked what Byrnes thought of Chambers' remark on September 7th, Byrnes replied that, based on his brief contacts with Chambers, he thought that Chambers would do what the Agreement provided. Chambers answered that he recognized that he (CTR) had a contractual obligation to file CTR's portion of the FCC application.

In a letter (Ex. P2) dated September 16, 1983, NASCO (Brian Byrnes) referred to the content of the conversations (paragraphs 5-7 supra) in detail, and again



notified CTR and Chambers that the assignee's part of the application had been ready and in suitable form for filing since September 2nd and requested that CTR "immediately prepare, have executed and forwarded the assignor's portion of the assignment application prior to September 23, 1983."

Chambers replied on September 21, 1983 (Ex. P3) that the Agreement speaks for itself and that he understood that his "attorney has contacted your attorney." He did not deny any of the content of the September 16, 1983 letter (Ex. P2).

9. On September 23, 1983, NASCO's FCC counsel, John Stewart, was informed by Chambers' (CTR) FCC counsel, Roy Russo, that the assignor's portion of the Application would not be filed on that date. On that same date Stewart caused a letter to be hand delivered to Russo, stating again that NASCO was ready and willing to file the assignee's portion of the Application and that Russo should notify him if and when the assignor's portion was received.

10. From August 9, 1983, the date that the Agreement was executed by the parties, until September 23, 1983, the date by which CTR was to submit its portion of the FCC application, there was no default or violation of the Agreement on the part of NASCO. In fact, all parties, including Chambers, were performing and ready to go forward on August 22, 1983. When Chambers called Bill Cook on August 29, 1983 (see paragraph 4 supra), they talked some forty-five minutes. Chambers did not complain then or thereafter of the violation of any pre-August 9, 1983 understanding or of the Agreement or interference with station operations or harassment of personnel or any difficulty with ascertainment interviews - all of which have

been alleged by defendants following the institution of this suit. He simply tried to generate with Cook some terms on which he could buy out of the Agreement. Cook was adamant.

11. In Chambers' conversations and correspondence with Byrnes after August 29, 1983, he never once alluded to any such breaches by NASCO, he talked only of an unrelated bond problem as the reason for his admitted reluctance to file CTR's portion of the FCC application. Although he admitted that he and CTR were bound by the Agreement (now a stipulated fact, see paragraph 25 infra), Chambers suggested on September 7, 1983 for the first time that he (CTR) might refuse to file timely his portion of the FCC application (paragraphs 6, 7 and 8 supra). His (CTR's) acts after August 29, 1983 finally culminated in his (CTR's) unjustified and arbitrary refusal to file CTR's portion of the FCC application by September 23, 1983. This refusal was a deliberate violation of their obligations under Paragraphs 6 and 31 of the Agreement. Their refusal or failure to file was in absolute bad faith.

12. Several weeks prior to October 17, 1983 Chambers sought the advice of Camp, Carmouche, Barsh, Hunter, Gray & Hoffman, his Lake Charles attorneys who had not represented him previously in this matter, to discover a way to defeat the August 9, 1983 Agreement and retain title and possession of the properties described therein for CTR. Upon investigation and discovery that the Agreement was not recorded, Gray, who had assumed the duties of trial attorney, suggested that the Public Records Doctrine might be an effective solution. The plan was simple. If CTR could sell the station site and the tower site to a third party prior to the recordation of the Agreement or the issuance of an injunction, the Court would be forced to recognize that title and possession of the properties was no



longer in CTR; was beyond the jurisdiction of the Court so that the Court could not enforce specific performance against CTR.

B. *The Initial Fraud:*

13. On Friday, October 14, 1983, counsel for NASCO notified Jonathan Golden, an attorney for Chambers and CTR and an officer of CTR, that it would file suit in the United States District Court for the Western District of Louisiana in Alexandria, Louisiana on Monday, October 17, 1983, seeking specific performance of the Purchase Agreement and that counsel for NASCO would appear in Alexandria at approximately noon on that date to request injunctive relief to preserve the status quo by enjoining the alienation or encumbrance of the subject properties until a judicial resolution of the dispute could be obtained. This information was transmitted to Chambers through his Lake Charles attorneys on Saturday, October 15, 1983.

This notice to the defendants Chambers, CTR and Gray, pursuant to the requirements of Fed. R. Civ. P. 65(b) and Rule II of the Local Rules of this Court, is designed to allow a defendant in an application for a temporary restraining order to be present at the hearing and defend his interests.

On the afternoon of Sunday, October 16, 1983, Chambers and Gray knowingly and deliberately took advantage of this notice to form and set into motion an illegal and fraudulent scheme and conspiracy which they have admitted was designed to place the operating properties of CTR beyond the reach and jurisdiction of this Court through the medium of the Louisiana Public Records Doctrine and to deprive NASCO of a judicial detemination of its rights to specific performance and still maintain CTR in

possession and in a position to continue its operations without interruption.[6] Their first act in furtherance of the conspiracy was the formation and execution of an act of donation in trust with a corpus of $1,000.00;[7] appointing Chambers' sister, Baker, as Trustee and naming Chambers' three adult children as beneficiaries. Chambers, Rita Guillory and Gray were fully aware on October 16, 1983 that the two tracts of land on which the TV station and the transmitters were located were to be sold to NASCO under the Agreement of August 9th. Yet, contemporaneously with the drafting of the Trust, Chambers, the sole member of the Board of Directors and the sole stockholder of CTR, by resolution directed Rita Guillory, the President of CTR, to execute duplicate warranty deeds conveying the two tracts to Baker, Trustee, for a recited consideration of $1.4 million dollars. The president of CTR complied.

14. On the evening of Sunday, October 16, 1983, Chambers telephoned his sister, Baker, in Birmingham, Alabama and informed her of the creation of the Trust and that it was his wish that she act as Trustee. He did not refer to the duplicate deeds which had been executed by Rita Guillory on behalf of CTR. After she consented to be Trustee, Chambers told Baker that he would be coming to Birmingham the next day to have her sign some documents.

15. The deeds were recorded at 8:30 a.m. on Monday, October 17, 1983; with no signature by the purchaser,

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6. *See* Transcript of April 11, 1988 hearing pp. 114-118; 152-159.

7. There is evidence that the $1,000 corpus was never paid into the Trust. This omission may have rendered the Trust invalid. La. R.S. 9:1731. *See* restatement 2d Trusts § 74 and Comment (b) to La. R.S. 9:1822.



Trustee Baker; with none of the consideration having been paid, and with CTR still in undisturbed possession despite the recordation of the deeds. All this was accomplished at the sole direction of Chambers and Gray.

16. Late on the morning of Monday, October 17, 1983, NASCO's counsel appeared before us in Alexandria, Louisiana and filed NASCO's complaint against CTR and Chambers seeking as part of the relief against those parties specific performance of the Agreement and a Temporary Restraining Order (TRO) to enjoin those parties from alienating or encumbering the properties covered by the Agreement. Gray had requested by a telephone call to the Clerk of Court's office that morning that he be informed when NASCO's counsel arrived. We personally called Gray, informed him that NASCO's counsel were present and that NASCO's counsel had stated to us that notice had been given to Gray of the injunctive relief sought by NASCO. Gray did not plead surprise or lack of notice. Had he done so, we, considering the substance of the relief sought, would have delayed action until he could be present. This was not considered, however, because Gray stated that he did not intend to be present and that he was making no statements or representations on behalf of his client. However, he did participate fully in the conference. We informed him of the nature of the injunctive relief sought, read to him verbatim that section of the suggested TRO which pertained to inspection of records. Gray suggested alterations, all of which were agreed to by NASCO's counsel. They were incorporated into the TRO which was then signed by us, with Gray's consent, at 1:34 p.m. A hearing for a preliminary injunction was set for October 24, 1983. Gray participated in the TRO conference by telephone as fully as he could have done if personally present. His participation was, in effect, a waiver of notice. Although Gray, during this discussion, was then deeply

involved in Chambers' scheme to place the property beyond the reach and jurisdiction of this Court, he made no mention of this to the Court.[8] Ex. P.10.

17. At or about 4:30 on the afternoon of Monday, October 17, 1983, after the deeds had been recorded, and after the TRO had been signed in Alexandria, Chambers flew to Birmingham, Alabama and met Baker at the airport. He directed her to sign her acceptance of the office of trustee and the $1.4 million note to CTR. She did as directed. She does not recall being told about the sale or receiving a copy of it. She signed the note without knowledge of what she was signing, what it was for, or how she was going to pay it. Baker was given no explanation and she did not ask for any.

18. On Tuesday, October 18, 1983, Gray admitted by letter the recordation of the duplicate deeds at 8:30 a.m. on Monday, October 17, 1983 and that he had intentionally concealed that fact from the Court prior to, during and after the issuance of the TRO.

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8. Unbeknownst to the Court, Gray surreptitiously tape recorded these telephone conferences. Transcripts of those tape recordings were attached as exhibits to Chambers' Memorandum in Opposition to Request For Sanctions. *See* Chambers Memorandum Exhibit A. Those transcripts reveal a telling exchange during the course of Gray's discussions with the Court on the scope of the proposed injunctive strictures:

> Judge [Scott]: I have an understanding of the representation bid [sic], *you are not trying to sell to someone else.*
>
> Gray: *I have made no representation.*

*Id.*, P. 2 (second conversation) (emphasis added).

No clearer opportunity to reveal the truth could have been offered to Gray. No clearer evidence of *deliberate* and *devious* concealment could be found.



19. Chambers' attorneys prepared a leaseback agreement from Baker, Trustsee, to CTR covering the same properties allegedly conveyed to Baker in the duplicate deeds of October 16, 1983. Rita Guillory signed this instrument on behalf of CTR on October 22, 1983 and forwarded it to Baker, directing her to sign and return it. Baker had no notice or other reason to expect the receipt of this lease. Baker knew nothing of its terms or contents and she had no part in any negotiations. No explanation accompanied the lease; Baker had no conversation with or advice from Rita Guillory, Chambers or anyone else. She simply signed and returned the lease on October 25, 1983. It is not shown in the record, even at this late date, that Baker was aware of the October 16, 1983 "sale" from CTR or the identity of the property covered by that "sale."

20. On Monday, October 24, 1983, we granted a preliminary injunction against CTR and Chambers, and entered a second temporary restraining order directed against Baker to prevent her from selling, transferring, or in anyway encumbering the CTR properties. Mr. Gray appeared as counsel for CTR and Chambers but denied representation of Baker. NASCO's counsel, having assumed Gray would represent her, then made attempts to contact Baker prior to the Court's issuance of the order. Failing such notice, the court, in the interest of justice, granted such TRO against Baker, as Trustee of the Facility Trust at 10:37 a.m. on October 24, 1983.

21. At this same meeting, although we were not yet aware of the lease-back agreement, we, for the first time, warned Gray that the acts of Chambers and himself on October 16 and 17, including Gray's concealment of those events, were reprehensible and unethical and that no acts of that nature should be repeated in the future. We felt that Gray would abide by that warning.

C. *The Pretrial Skirmishes:*

22. Our expectations were short-lived. In November 1983 Chambers, acting on the advice of Gray, refused to allow an inspection of corporate records in direct defiance of the standing preliminary injunction. The ensuing contempt proceedings, *NASCO, Inc. v. Calcasieu Television & Radio, Inc.,* 583 F. Supp. 115 (W.D. 1984), vindicated NASCO's rights, but only at the price of significant expense, delay, and waste of resources. That price was made more dear by Gray's vigorous prosecution on behalf of Chambers of two separate and independent appeals which were dismissed by the appellate court without consideration of the merits. *See NASCO, Inc. v. Calcasieu Television and Radio, Inc.,* 752 F.2d 157, 157-58 (5th Cir. 1985).

23. Subsequently a series of meritless motions and pleadings and delaying actions were initiated by defendants.

a. Two motions for summary judgment filed by Gray and Boland on behalf of Chambers (CTR).

b. Motion for summary judgment filed by Curry on behalf of the Trustee followed by Motion to Strike and a supplemental motion thereto; a motion to reconsider (no new grounds).

c. Motion for protective order and clarification filed by Gray on behalf of Chambers (CTR).

d. Chambers (CTR) through Gray filed baseless charges and counterclaims against NASCO alleging fraud, harassment, interference with TV station operations, spreading of misinformation, public disapproval of the sale and of plaintiff as owner-operator of the station. Also charged were unnamed breaches of the Purchase Agreement by NASCO and NASCO's disregard for a non-existent oral side-agreement with Chambers (CTR).



e. Chambers (CTR) through Gray injected pointless new issues: NASCO's conduct of its FCC ascertainment survey; its ability to pay the purchase price; its plans for the future management of the station; its commitment to the community interest.

f. Absolutely needless depositions of officials of the bank that was to finance the purchase price were noticed by Gray and taken by McCabe on behalf of Chambers (CTR).

g. Depositions of the entire NASCO board of directors were noticed and five were taken.

h. Throughout the course of these proceedings prior to the trial on the merits, Chambers (CTR) and Gray sought repeatedly, sometimes sucessfully, continuances of trial dates, extensions of deadlines and deferments of scheduled discovery.

All of the motions mentioned above in a, b and c required research and opposition by NASCO and consideration by the Court. All were filed in absolute bad faith by attorneys who conceived "The Initial Fraud" (Gray) or had become intimately familiar with it through instruction, the record and depositions (Curry). Chambers (CTR), Baker (Trustee) and these attorneys, as a basis for these motions, brazenly and deliberately urged upon this Court as uncontroverted fact, the attempted simulated and fraudulent sale to the Trustee Baker which all of them knew was fraudulent and was attempted for the sole purpose of depriving NASCO of its right to specific performance by

placing the property beyond the jurisdiction of the Court.

The charges mentioned in d above were deliberate untruths and fabrications by Chambers. They were, on their face, improbable and unrealistic. Yet these attorneys, without any investigation whatsoever, filed them. We find, under the circumstances, that these attorneys knew, at the time that they were filed, that they were false.

The acts described above in e, f, g and h were simply part of the sordid scheme of deliberate misuse of the judicial process; to defeat NASCO's claim by harrassment, repeated and endless delay, mountainous expense and waste of financial resources.

24. Having held a pretrial conference and several status conferences and ruled on several motions in preparation for a trial on the merits set for February 27, 1985, we were confronted on January 28, 1985 by a motion filed on behalf of Chambers (CTR) by Gray to recuse the trial judge for bias and prejudice. An expedited evidentiary hearing was had; we considered and denied the motion. A writ of mandamus to compel disqualificataion was filed with the U.S. Court of Appeals for the Fifth Circuit by Gray for Chambers (CTR). Curry, on behalf of the Trustee, filed an "answer" in which he urged the granting of the writ. The writ was denied as being meritless, but trial on the merits again was delayed.

25. Finally, on the eve of trial, Chambers (CTR), Baker, and their counsel stipulated that the Purchase Agreement was valid and enforceable, and that Chambers (CTR) had breached the agreement on September 23, 1983. No clearer indication could be found that all of the previously asserted affirmative defenses, all of the previously asserted counterclaims, all of the multitudinous



pleadings and motions and oppositions prosecuted so fervently by the defendants, were untruths and distortions and were absolutely devoid of substantive merit. Defendants obtained no tactical or strategic benefit by this stipulation. They suddenly were faced with the necessity of producing evidence to sustain the charges and the fact that Chambers' testimony in support of those allegations would be perjury. Of the 100 witnesses listed by Chambers prior to trial, only two appeared to testify. Of all the multitude of allegations and counterclaims asserted by Chambers and filed by Gray and Curry prior to trial, only one defense was actually presented: the Public Records Doctrine defense manufactured as part of "The Initial Fraud".

C. *The Posttrial Skirmishes:*

26. After the April 1985 trial on the merits and during the delay for submission of authorities, suggested findings and conclusions and our consideration of the merits, Chambers (CTR) and his attorneys continued to use every means, every subterfuge, every ruse possible to avoid performance of the Purchase Agreement.

a. Chambers, without notice to NASCO, petitioned the FCC for permission to construct a new transmission tower for the station, and to relocate the station's transmission facilities to that site. This would have been a material alteration of the *status quo*. The tower sites would be covered no longer by the Purchase Agreement. Only the informal intervention of this Court, and NASCO's threat of further contempt sanctions, persuaded Chambers to withdraw the application.

b. Following the rendition of judgment on November 27, 1985, Chambers and Baker, acting through Gray and Curry, moved this Court to stay its judgment pending their

contemplated appeals. Extensive memoranda, and no less than three status conferences, ensued. All parties having admitted that the Purchase Agreement was legal, valid and enforceable, the Public Records Doctrine having been rejected and all other baseless defenses having been withdrawn, the plaintiff having suffered delay, harassment and enormous expense since October 17, 1983, we refused steadfastly and absolutely to grant a stay. Curry, on behalf of the Trust, filed a petition for a writ of mandamus to the Fifth Circuit in an attempt to *force* this Court to grant the stay. Chambers petitioned the Fifth Circuit directly. Both were denied. Chambers then petitioned (via his Washington lawyers) the Honorable Byron R. White, Associate Justice of the United States Supreme Court, to stay our merits judgment. That petition, too, was denied.

c. During the pendency of the defendants' appeals, Chambers (CTR) renewed his efforts to circumvent the merits judgment by fomenting opposition to the pending application for FCC approval of the transfer of the station license. Specifically, formal oppositions were lodged with the FCC, and were subsequently prosecuted, by two corporate officers of CTR — in direct violation of both the injunctive orders and the merits judgment. NASCO was thus compelled to seek contempt sanctions for a third time. Again, by informal intervention by us, the oppositions were withdrawn.

d. Gray resigned as counsel for Chambers and CTR on April 2, 1986. Thereafter Chambers (CTR) continued his refusal to begin preparation to close the sale. NASCO, on July 1, 1986, again was forced to seek judicial assistance and hearing was fixed for July 16, 1986. Thereupon Chambers called upon his Boston, Massachusetts attorney, Edwin McCabe, to command his campaign of defiance, delay, harrassment and expense. McCabe had



represented Chambers (CTR) previously in the pointless depositions of bankers who had done business with NASCO. McCabe proved to possess unethical abilities equal to the job.

e. On July 21, 1986, we sustained NASCO's motion to quash the subpoena duces tecum filed on behalf of Chambers and CTR directing NASCO to produce confidential financial information pertaining to discussions between plaintiff and financing institutions with whom plaintiff had conferred concerning the financing of the purchase price for television station KPLC-TV.

f. At the commencement of the July 16, 1986 hearing we informed McCabe that we had encountered much sanctionable conduct in the trial of this case and we would not tolerate or countenance any additional conduct of that nature, and that the hearing would be limited to the trial of Chambers' (CTR) contention that certain operating equipment, which had replaced equipment listed in Exhibit B on August 9, 1983, should not be included in the sale. McCabe had already filed an opposition and prehearing memorandum, raising a multitude of irrelevant arguments; a request for a trial by jury on the pending motions, and a motion *in limine* to exclude any evidence pertaining to station assets not listed in Exhibit B to the Purchase Agreement. We denied all of these prehearing motions.

g. The July 16, 1986 hearing went into recess for several days and during that recess the defendants unilaterally, and without notice to the Court, or opposing counsel, removed from service *all* of the equipment at issue in the hearing. That action was undertaken at McCabe's direction and was an attempt by Chambers (CTR) and McCabe to resolve extrajudicially and through self-help the very issues then before the Court. On July 22, 1986, we

ordered that the equipment previously removed be returned to service, and to remain so during the remaining pendency of the litigation. The July 16, 1986 hearing was itself a case study in deception. CTR's accountant, and two of its corporate officers (Rita Guillory Chambers, Chambers' wife, and his longtime employee, Albert Smith) gave false and perjured testimony concerning the ownership and use of the disputed assets. Seventeen fraudulent equipment leases were introduced by McCabe to prove that the disputed equipment did not belong to CTR but to another Chambers corporation and was merely leased to CTR. Ultimately these leases were found by us to be "nothing more than instruments of deception."

h. On July 28, 1986 — despite the pendency of NASCO's motion for judicial assistance, despite our clear and repeated orders that the *status quo* would be preserved, and despite the fact that we had taken NASCO's motion under advisement for the rendition of judgment — McCabe caused a letter to be sent to NASCO's counsel stating Chambers' unilateral intention to close the sale of KPLC-TV on August 4, 1986, and to convey only those assets listed on Agreement Exhibit B — expressly excluding the disputed equipment that was the subject of the pending motion for judicial assistance. That letter was nothing more and nothing less than an attempt to maneuver NASCO into position for the termination of the sale by Chambers under Paragraph 16 of the Purchase Agreement. On July 31, 1986 we granted NASCO's pending motion seeking relief from the timing and termination provisions of Paragraph 16 of the Agreement.

i. On August 5, 1986, McCabe caused to be filed (1) an appeal from our order of July 31 (granting relief from the timing and termination provisions of Paragraph 16); (2) a separate appeal from our order of July 24, 1986 (ordering



Chambers to restore the disputed equipment to service); and (3) a motion to vacate our merits judgment of November 27, 1985 for the specific performance. On the same date, Chambers' New Orleans counsel moved the Court of Appeals for the Fifth Circuit to upset and continue the oral argument on the pending appeals, then scheduled for August 6, 1986. That motion was summarily denied by the appellate court.

The basis for McCabe's motion to vacate the merits judgment was the termination provisions of the Purchase Agreement; in essence, an argument that NASCO had breached the Purchase Agreement by declining to close the sale on August 4, 1986 in submission to Chambers' unilateral demand, and that, because Chambers had managed to delay both FCC approval of the license transfer and the closing, Chambers was entitled to terminate the contract.

27. This Court throughout this proceeding has attempted to restrain the fraudulent and unethical conduct of the defendants and their attorneys.

a. As previously stated, paragraph 21 supra, we warned Gray of his unethical actions (The Initial Fraud) on October 24, 1983.

b. The judgment of this Court after the contempt hearing a month and a half later was, by its inherent nature, a warning against any similar conduct in the future.

c. Some months after that we called, on our own initiative, a status conference to determine why depositions of a number of bankers had been noticed and whether these were actually necessary. When we were informed by

defendants' counsel that the purpose was to test NASCO's ability to meet the $18 million dollar purchase price mentioned in the Purchase Agreement, we informed them that that was not a relevant issue and that a more positive and less expensive way to determine that issue was an offer by defendants to perform the Purchase Agreement. We cancelled the uncompleted depositions consistent with our powers under Fed. R. Civ. P. 26(g). This was another warning.

d. On January 28, 1985, about a month prior to the then current trial date of February 27, 1985, Chambers and Gray filed a motion to disqualify the trial judge. Although the motion was dismissed by us because the supporting affidavit by defendant Chambers was legally insufficient, we felt that the motion actually was frivolous and had been filed for tactical purposes. We also felt that, because of the nature of the proceeding, a renewal of the warning was inappropriate.

e. We called a status conference on April 8, 1985, nine days prior to the final trial date of April 17, 1985. At this conference we again gave warning and distributed to the attorneys copies of Judge Schwartzer's article, "Sanctions Under the New Federal Rule 11 - A Closer Look", 104 F.R.D. 181 (1985).

f. At the commencement of the hearing held July 16, 1986, we again repeated our warning, this time specifically to McCabe. McCabe's reaction is described above, paragraph 26f-i.

28. Little more need be said about the role of Chambers and Gray in this sordid, dishonest and deliberately unethical chain of events called a lawsuit. In the memoranda of authorities submitted by them on the



sanction phase of this suit, each vigorously assails the character and credibility of the other as if this automatically places his own character and credibility beyond reproach. But the record itself establishes that both are capable of any fraud that is necessary for a given purpose, and that neither is worthy of belief.

On Sunday, October 16, 1983, one day after they had received notice that NASCO was applying for injunctive relief against CTR and Chambers, Chambers and Gray formed a conspiracy for the sole and dishonest purpose of defeating the Purchase Agreement which both of them knew at the time to be absolutely legal and enforceable. Both of them were admirably equipped to carry out the purposes of the conspiracy since neither of them was restrained by any sense of honesty, integrity or ethics. The very first act of the conspiracy, the so-called Public Records Doctrine defense, set the ethical tone of all of its acts which followed. It was a web of deliberate fabrications, misrepresentations and fraud, some of which were intended to mislead the public in general while others were aimed only at the Court and opposing counsel. One of the original representations to the Court and opposing counsel was that the Trust had been contemplated for years and that its confection on October 16, 1983 was simply coincidental. Though not actually a Cash Sale, the form of the sale was drafted and crafted to have the appearance of a Cash Sale so that it could be recorded without the signature of the vendee on Monday morning, October 17, 1983, before the TRO, prohibiting such transfer, could be granted by the Court. It was absolutely null and void because the recited purchase price had not been paid and the vendor had not delivered possession of the property. In his conversations with the Court, Gray did not disclose the existence of the Trust or the existence of the sale from CTR to the Trustee. Without the knowledge or permission of the Court, he

recorded that conversation with the Court. Although he knew that the TRO had issued at 1:39 p.m. on Monday, and that Chambers was making a trip to Birmingham, Alabama to secure the Trustee's signature on an acceptance of the Trust and on the worthless $1.4 million dollar note, he made no effort to warn Chambers that these acts in completion of the sale had been restrained by the issuance of the TRO. The leaseback agreement executed some days later, in absolute contempt of the TRO and the injunction, sought to complete the sale by delivering constructive possession of the properties to the Trustee and to give the Trustee money to pay for the property which CTR itself had sold to the Trustee. All of the activities to be performed thereafter by conspirators and those who joined them later, namely, McCabe, Baker and Curry, in connection with the trial of this lawsuit were performed in connection with and in the furtherance of the conspiracy. Chambers continued his activities through August of 1986. In absolute violation of the injunction and of our Judgment of November 27, 1985, two of the officers of CTR filed oppositions to the joint applications for transfer which had been filed with the FCC by the Order of this Court. Little over a month before the appellate court issued its decree in favor of NASCO and finding sanctions, Chambers hired McCabe who immediately rekindled the flames of harassment, delay and expense and McCabe, on behalf of Chambers, engineered the removal of equipment at the July 16, 1986 hearing and induced Chambers' wife, Rita Guillory Chambers, still President of CTR, another officer of CTR and CTR's CPA to perjure themselves as has previously been set forth. *See* Opinion dated August 7, 1986, Rec. 306.

Chambers has repeated ad nauseum that he knows nothing of courts or the law, that if he is guilty of any improper act, it is only because he has been led astray by the



improper advice of his counsel. His own statement absolutely refutes that contention, Record Pleading 139. Mr. Chambers has been involved frequently in the preparation of defenses in many lawsuits, he testifies and often is the principal witness. He is completely at home in court. In fact, in January and the first part of February, 1985, alone he was involved in preparation of defenses and was scheduled to testify in the following cases:

1. *Powers Medical Systems, Inc. v. Intermedics, Inc.*, Civ. No. 82-623, U.S. District Court for the District of Oregon. Docketed for trial beginning on January 8, 1985. Mr. Chambers is a major witness.

2. *American Pacemaker Corporation v. Fairchild Camera and Instrument Corporation et al*, Civ. No. 448521, Superior Court of California, Santa Clara County; and *Fairchild Camera and Instrument Corporation v. American Pacemaker Corporation et al*, Civ. No. 526893, Superior Court of California, Santa Clara County. Trial in enforcement suit set to begin January 15, 1985. Mr. Chambers is a witness.

3. *Philip R. Beutel v. Intermedics, Inc., et al*, Civ. No. 79C3022, 23rd Judicial District Court of Brazoria County, Texas. Trial scheduled to begin on January 28, 1985. Mr. Chambers is a principal witness.

4. *Intermedics, Inc. v. Cara E. Barer, Independent Executrix of the Estate of Albert P. Beutel, II*, Civ. No.83-F-1153. 149th Judicial District Court of Brazoria County, Texas. Trial to begin before February 1985. Mr. Chambers is a witness.

5. *Charles Moore, M.D. v. Intermedics, Inc. and*

*Intermedics Intraocular, Inc.*, Civ. No. 80-F-1320, 149th Judicial District Court in Brazoria County, Texas. Trial set to begin on February 18, 1985. Mr. Chambers is a principal witness.

He deliberately allowed his wife and three other employees to perjure themselves at the hearing of July 16, 1986. He has been very deeply involved in the defense of this case. He was the strategist. Gray was the tactician.

Gray was the second most important schemer and conspirator. As the conspiracy's tactician, he was perfectly willing to and did employ tactics involving abuse of the judicial machinery and process, fraud and untruths to the Court and unethical methods to achieve the purposes of the conspiracy as has been outlined above.

McCabe was the third schemer and conspirator. Although he had taken part earlier in the suit, his principal involvement occurred in July and August of 1986 at a time when the Court was using every means at its disposal to enforce its judgment of November 27, 1985 and complete the sale to NASCO. During his brief term as Chambers' attorney he displayed talents very similar to those of Gray. His unsavory actions, see paragraph f-i supra, convinced this Court that it could expect another prolonged campaign of harassment, delay and expense. Plaintiff and this Court can be very thankful that the Appellate Court's decree of August 6, 1985 had the effect of cutting the duration of his term of office to a period of little over a month.

Baker was certainly a conspirator. Although she did not have full knowledge of the conspiracy and did not independently and aggressively pursue the goals of the conspiracy, she was, as Trustee-Owner of the res involved in the initial fraud, indispensable to the success of the



conspiracy and the Public Records Doctrine defense in particular. She was the unfailing tool of her brother, the chief conspirator, and performed his every request without inquiry or question.

Curry also was a schemer and conspirator. Throughout this proceeding he has posed as the attorney for Baker, the individual, as if the limits of her overall knowledge and contact with the origin, purposes and progress of the conspiracy and litigation was in some manner reflected on him. Nothing can be further from the truth. Curry represented the Trust before he ever heard from Baker. He was contacted/hired directly by Gray to assist and defend the Public Records Doctrine defense contrived by Gray in which Chambers (settlor) established a Trust so that Chambers (sole stockholder and director of CTR) could authorize Chambers (CTR) to sell CTR's operating properties to Chambers (Trustee). Gray himself already represented all of the Chambers' identities except the Trust, but even with the separate representation of the Trust by Curry, it was painfully transparent that the sale and lease involving the Trust were a mere sham. Curry knowingly and enthusiastically followed each tacit by Gray with a similar "me too" tactic on behalf of theTrust. His support was vital to the fraudulent Public Records Doctrine defense and valuable to the harassment tactics of Gray and Chambers, but he introduced no new or additional tactics to the defense. His role was one of passive but enthusiastic support.

The record is bare of one instance in which he truly advised his client. She knew no more about her responsibilities as trustee or about the details of this law suit on November 8, 1985 than she did at its inception. Curry's sole responsibility was to assure that she remained the unfailing tool of her brother. In this endeavor he was an

admirable success.

29. As a direct result of the initial fraud upon the trial court, and the subsequent bad faith, dilatory defense tactics in the trial court, NASCO has incurred legal fees, costs, and expenses totalling $996,644.65:

(Attached hereto as 27(a) and 27(b)



LAW FIRM: SCOFIELD, BERGSTEDT, GERARD, MOUNT & VERNON

| | |
|---|---|
| Total Fees* | 486,901.25 |
| Total Expenses* | 52,508.55 |
| Minus Fees and Expenses Awarded as Contempt Damages | -4,454.00 |
| Minus Fees and Expenses Awarded as Appellate Sanctions | -48,633.57 |
| NET TOTAL | 486,322.23 |

*Includes fees and expenses of $18,703.43 for the instant proceeding.

LAW FIRM: NEAL & HARWELL

| | |
|---|---|
| Total Fees* | 424,795.00 |
| Total Expenses* | 55,262.57 |
| Minus Fees and Expenses Awarded as Contempt Damages | -300.00 |
| Minus Fees and Expenses Awarded as Appellate Sanctions | -17,589.45 |
| NET TOTAL | 462,168.12 |

*Includes fees and expenses of $34,756.25 for the instant proceeding.

LAW FIRM: CROWELL & MORING

| | |
|---|---|
| Total Fees | 44,563.00 |
| Total Expenses | 3,591,30 |
| NET TOTAL | 48,154.30 |

| | |
|---|---|
| TOTAL FEES AND EXPENSES | 996,644.65 |



**30. NASCO's evidentiary submissions show that the fees, expenses, and costs incurred in responding to the defendants' frivolous appeals total $66,223.02. Of that total, the sum of $63.63 is attributable to "costs," as that term is defined in Fed. R. App. P. 39 (specifically, $59.63, in printing costs for the appellee's brief, and $4.00 in costs paid to the Clerk of the Fifth Circuit). The remainder, $66,159.39, is attributable to attorney's fees and expenses.**

| | | |
|---|---|---|
| (1) | Double costs | $ 127.26 |
| (2) | Attorney's fees and expenses | $66.159.39 |
| | TOTAL | $66,286.65 |

E. *SUMMARY COMMENT:*

**31.a. First Phase - This suit, as filed on October 17, 1983, was very simple and straightforward. NASCO alleged that Chambers and CTR had breached the Agreement by their failure to join with NASCO, on or before September 23, 1983, in an application to the FCC for the transfer of the KPLC-TV license as provided in the Agreement and demanded as follows:**

**A. Specific performance of the Purchase Agreement along with damages against defendants for their failure to perform the Agreement.**

**B. An expedited discovery schedule and expedited hearing.**

**C. Injunctive relief to preserve the *status quo* and NASCO's access to the records of CTR.**

D. Alternatively, and should the Court find that specific performance was not an appropriate remedy, damages for defendants' refusal to perform.

Although many preliminary matters were presented and were considered, tried and decided by us (see Third Phase infra), the incredible fact is that *the First Phase, the merits of this suit, was never tried.*

b. Second Phase - After our conversation with Gray and the issuance of the TRO on October 17, 1983, the case still looked simple and we were prepared to expedite the trial of the case as requested as soon as defendants' answer was filed. We soon discovered, however, that we no longer had the simple suit which we expected.

NASCO's notice to attorney Golden on Friday, October 14, 1983 was transmitted to Chambers, CTR and Gray on Saturday, October 15, 1983, and provoked a meeting in Gray's office on the afternoon of Sunday, October 16, 1983 at which Chambers and Gray, along with other members and employees of Gray's firm, conspired to give birth and did give birth to the despicable and unethical chain of events which we have identified as "The Initial Fraud". These acts, along with the lies and misrepresentations to the Court which accompanied them, made the suit more complicated and more difficult. By October 24, 1983, the date of the preliminary injunction conference, it was clear that NASCO had to make Baker a party defendant and it was most important to include her on an emergency basis in the injunction since the Trust was now the apparent record-owner of CTR's operating properties. Although NASCO's cause of action remained specific performance, that issue could not be addressed by us until we resolved the question of whether this Court has the power to restore the *status quo* existing at the time that



NASCO delivered its notice to Golden, that is, the power to rescind the sale to the Trust so that title reverted to the defendant CTR. This Second Phase, whether the fraudulent sale from CTR to the trust had deprived this Court of jurisdiction, was the only issue before the court in the trial on the merits of April 17, 1985.

c. Third Phase - This phase is the informal and potentially effective defense of delay, harassment and the generation of mountainous expense so as to reduce the plaintiff to exhausted compliance. Chambers, Gray, Curry and McCabe initiated, provoked, pursued and tried any and every collateral side issue that human ingenuity could contrive. Although there was some legal basis for some of these defenses, when we view them in context with the entire record, it is quite obvious that defendants' true purpose was delay, harassment and killing expense. To borrow a phrase from the appellate court's unpublished opinion of August 27, 1986, "As judges, we cannot check our common sense in the robing room and allow disingenuous arguments to characterize as serious an appeal as manipulative as is this one before us."

Because of the admonition and warning which we voiced to Gray on October 24, 1983, and his apparent acceptance of that warning, we were confident that no additional untoward incidents would occur. We were confident that the expeditious resolution of this suit, as contemplated originally, could be accomplished.

We were dismayed and disappointed when NASCO on December 15, 1983 filed a Petition to Show Cause why defendants CTR and Chambers should not be held in contempt for their refusal to allow NASCO to examine certain records of CTR. This refusal was based on the advice of Gray on grounds that there was an ambiguity in Paragraph

19 of the Agreement and in the injunction and that the specific examination sought by NASCO was not authorized by the language of those instruments.[9] We ruled in favor of NASCO on the grounds that if there was an ambiguity it should be clarified by application to the Court and not by the unilateral action of defendants. The interlocutory appeal was denied by the Appellate Court on June 8, 1984.

Thereafter, Gray, on behalf of Chambers and CTR, and Curry, on behalf of the Trustee, filed a number of meritless and pointless motions, including a summary judgment motion filed by Gray on June 15, 1984, followed on July 6, 1984 by a similar motion by Curry demanding dismissal of the suit on grounds that the joinder of an alleged indispensable Louisiana defendant would destroy diversity. They filed baseless, affirmative defenses and counterclaims (later destroyed by their own stipulations), pointless new issues, irrelevant or unnecessary depositions, all as is described in more detail in paragraphs 23-27 supra. Untruths and misrepresentations were asserted mainly as affirmative defenses and counterclaims. At the time they were filed, the record was bare of any evidence that they were baseless. This was not known to the Court until the filing of stipulations immediately prior to trial. Not all of these demanded a great deal of court time but they were costly to NASCO in terms of harassment, time, preparation and expense.

As related in pararaph 24 supra, on January 28, 1985, approximately one month prior to the then current trial date of February 27, 1985, Chambers and CTR filed a

9. This, incidentally, was the specific language incorporating Gray's comments and read verbatim to him and approved by him prior to our signing the TRO on October 17, 1983. The same language appears in the injunction issued by us by consent of the parties on October 24, 1983.



motion to disqualify the trial judge. Although the mover was well prepared, NASCO, because of the expedited procedure adopted by the Court to avoid delay, had to utilize extraordinary efforts by its attorneys to provide an opposition to the motion. The matter was heard and the motion denied for reasons recited in open court. A Writ of Mandamus to compel disqualification was filed with the U. S. Court of Appeals for the Fifth Circuit, supported by an Answer filed by Curry on behalf of the Trustee. Although writs were denied, the desired effect was attained. The trial was continued and did not begin until April 17, 1985.

All briefs and authorities had been submitted by the middle of June. Because of a personal difficulty we were absent from our office for a period of over three months and could not begin consideration of these authorities until the end of September when we were involved also in our trial calendar. Our Opinion issued November 8, 1985 and Judgment on the Merits was signed November 27, 1985. We retained jurisdiction and refused to stay proceedings so as to implement the completion of the sale at the earliest possible date. Petition for Writs of Mandamus or Prohibition were denied on appeal.

Throughout the period of trial we adhered and maintained our objective to try the specific performance case as expeditiously as possible. Suit was filed on October 17, 1983 and our final opinion on the merits was rendered November 8, 1985, a period of slightly over two years, including the period of the Court's absence in the summer of 1985. We hold that the extraordinary amount of costs and expenses expended in this proceeding were caused not by lack of diligence or any delays in the trial of this matter by NASCO, NASCO's counsel or the Court, but solely by the relentless, repeated fraudulent and brazenly unethical efforts of Chambers, Gray and their co-conspirators acting

with them, namely, McCabe, Baker and Curry, in their efforts, first, to deprive this Court of jurisdiction and, second, to devise a plan of obstruction, delay, harassment, and expense sufficient to reduce NASCO to a condition of exhausted compliance.

Although our Opinion of November 8, 1985 and our Judgment of November 27, 1985 should have terminated all further resistance to the specific performance of the Purchase Agreement (after all, the validity of the Agreement and its breach by Chambers (CTR) had been stipulated and the fraudulent Public Records defense had not deprived the Court of jurisdiction), this did not occur. Although Gray retired from his representation of Chambers (CTR) on April 2, 1986, Chambers continued with renewed vigor and vengeance his campaign of oppression, delay, harassment and massive expense. Without again discussing these incidents, they include: opposition by two CTR officers to the joint application of the transfer; renewal of discovery to determine NASCO's financial condition; the attempt, without informing the Court or opposing counsel, to substitute worn-out or obsolete equipment for the operating equipment in place on July 16, 1986; the perjured testimony in open court by Chambers' wife Rita Guillory Chambers, his long-time CTR officer-employee, and his employment of McCabe to rekindle and renew the campaign of harassment, oppression, delay and massive expense.

It would be impossible within the limits of this opinion to develop an accurate picture of this massive and absolutely unnecessary lawsuit forced on NASCO by Chambers' arbitrary and arrogant refusal to honor and perform this perfectly legal and enforceable contract. The record in this Court alone consists of 23 volumes of pleadings and 14 fully-packed expansion files of evidentiary material.



Even these voluminous records do not reflect a host of informal conferences on such subjects as requests for delays and extensions, the authority of Byrnes to sign the Purchase Agreement on behalf of NASCO; the waiver of certain of plaintiff's initial demands; bifurcation; whether defendants were entitled to a jury trial; whether Tennessee law applied; defendants' allegation that this Court was invading the exclusive jurisdiction of the FCC; Chambers' application to the FCC to remove the broadcast towers to a site not covered by the Purchase Agreement; this Court's informal action to avoid contempt proceedings against two CTR officers who had filed with the FCC oppositions to the transfer of the KPLC-TV license to NASCO. These oppositions were filed in open defiance of the injunction affecting CTR and Chambers and the injunctive provisions of our judgment on the merits of November 27, 1985 in which this Court retained jurisdiction during the period of appeal for the purpose of implementing specific performance of the contract. These are instances of Chambers' continued opposition and continued refusal to comply with the Purchase Agreement even after he had been ordered to do so in our executory and unstayed judgment on the merits of November 27, 1985. Nor do they reflect the considerable and successful efforts of NASCO, Chambers and their attorneys to settle the amount of delay damages to which NASCO was entitled under the specific performance statutes of Louisiana. Or the records of the Appellate Court in the petitions for mandate and the several appeals filed by Gray and by Curry on behalf of Chambers (CTR). Or the records of the FCC in the several forays made into that agency. All this needless delay, harassment and expense; this despicable and unethical use and misuse of the judicial machinery and process was initiated by Chambers and Gray and was voluntarily and enthusiastically adopted by their co-conspirators, Curry and McCabe.

On August 6, 1986 the United States Court of Appeals for the Fifth Circuit affirmed the trial Court's judgment on the merits, found the appeal to be frivolous and assigned sanctions, and directed the trial court to determine whether sanctions for the proceedings held before it were appropriate. This decree of the Appellate Court halted effectively all further efforts of obstruction by defendants and their attorneys, and additional appeals then pending were withdrawn. The sale, under close Court supervision, was completed on August 27, 1986.

Even after the sale had been completed on August 27, 1986, two unresolved matters had to be concluded, namely, (a) the determination of the monetary amount of damages which had to be paid to NASCO under Louisiana law for Chambers' delay in performance of the contract and (b) sanctions - determination of the monetary amount of the sanctions decreed by the Appellate Court and a determination of whether sanctions were appropriate against defendants and their attorneys for the manner in which the defense was conducted in the trial court and the character and amount of such sanctions if they were held to be appropriate. As stated previously, item (a), delay damages under Louisiana law has been disposed of. We now address the sole remaining issue - sanctions.[10]

10. We were somewhat uncertain on the methodology to be utilized by us in determining the sanction issues as they related to proceedings before the district court. We were mindful that the responsibilities of the judge in a case of this kind are quite distinct and incompatible with those of an attorney-investigator in such case. Neither research nor our discussions with the Justice Department or the Administrative Office produced a solution. We also realized that an attorney would be the necessary and proper person to defend this court's judgment in case of appeal. The Third Circuit has recognized the problem in the context of Rule 11 appeals:



## CONCLUSIONS OF LAW

32. There are three methods under which we may consider the issue of sanctions: Federal Rule of Civil Procedure 11 (Rule 11), 28 U.S.C. § 1927, and the inherent powers of the Court.

33. *Rule 11*: Rule 11, as amended in 1983, provides in pertinent part, as follows:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name. . . . The signature of an attorney or party constitutes a certificate by the signer

Footnote 10 continued.

> Short of relying on or analogizing to contempt procedures and appointing counsel to defend the district court's ruling - a step we have not taken - we are left in an uncomfortable position. We must play not only our accustomed and proper role of neutral adjudicator, but also (albeit temporarily) the role of adversary to the appellant in order to test the assertions made on appeal. Our role is further complicated by the institutional association we share with the appellant's "adversary" in fact: the district judge. We are surprised that this problem has attracted no attention. We offer no solutions to it, but simply note its existence.

*Snow Machines, Inc. v. Hedco, Inc.*, 838 F.2d 718, 726 (3d Cir. 1988) (*see* footnotes 6 and 7, also at p. 726 but omitted in the above quote). We finally decided that NASCO's counsel would certainly make application for sanctions in the form of attorney's fees and expenses. The Court would rely on that application and the oppositions filed by defendants for investigation and the appropriateness of that kind of sanction. The Court would rely on its own research and any additional research that we might request of the parties regarding the imposition of other types of sanctions. On appeal, NASCO's counsel is to defend the entire judgment of this Court, including sanctions other than attorney's fees and expenses. If sanctions are found and become final, they shall include the attorney's fees and expenses of NASCO's counsel in representing NASCO and the public in the sanction phase of this suit.

> that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . .

Fed. R. Civ. P. 11.

The rule became effective August 1, 1983 and this case was filed less than two and a half months later. It is well established that Rule 11 prior to its amendment in 1983 was rarely applied. The amendment was intended to reduce the reluctance of Courts to impose sanctions by emphasizing the responsibilities of attorneys and reenforcing those obligations through the imposition of sanctions, *Thomas v. Capital Sec. Services, Inc.*, 836 F.2d 866 (5th Cir. 1988). Although it broadened responsibilities, it did so in a narrow area. Rule 11 appears in Section III of the Federal Rules of Civil Procedure entitled "Pleadings and Motions." The topical title of Rule 11 itself is "Signing of Pleadings, Motions, and Other Papers; Sanctions." It is concerned only with the certification implied in the initial signing of a "pleading, motion, or other paper." It tests the attorney's conduct only at the time the paper is signed. As was noted by the Second Circuit:

> While the drafters of the rule could easily have



> further extended its application by referring to the entire conduct of the proceedings, they failed to do so and instead chose to expand only the categories of papers to which the rule applies.

*Oliveri v. Thompson*, 803 F.2d 1265, 1274 (2d Cir. 1986). The problems of this case have little to do with the certification involved in the signing of a "pleading, motion, or other paper." On the contrary NASCO has alleged that the defendants have: (1) attempted to deprive this Court of jurisdiction by acts of fraud, nearly all of which were performed outside the confines of this Court, (2) filed false and frivolous pleadings, and (3) attempted, by other tactics of delay, oppression, harassment and massive expense to reduce plaintiff to exhausted compliance. Clearly the acts alleged under "1" above do not involve certification and cannot be considered under Rule 11. The two most important instances of charge (2) are the absolutely false assertions knowingly and deliberately made by Chambers (CTR) and his attorneys in their answers and counterclaims and in their motion to disqualify. There was no evidence in the record establishing the falsity of these allegations until the beginning of the trial of the merits. Thus sanctions under Rule 11 at the time of filing of the answers and counterclaims in November 1983 and October 1984 were impossible. Certainly the Court could not have used Rule 11 to dispose of the motion to disqualify. Nor could the charges (3), such as the applications to the FCC to remove the communication towers to another site purchased by CTR, or any other acts referred to in (3) have been reached by Rule 11. We find and agree with the parties to this sanction proceeding that Fed. R. Civ. P. 11 does not furnish a basis for the consideration of the sanctionable acts alleged by NASCO. We find that Fed. R. Civ. P. 11 for the levying of sanctions at this time, at the time of the Appellate Court's decree on August 6, 1986, and at the time the acts

themselves were committed, to be insufficient for our purposes here.

34. *28 U.S.C. § 1927*: This statute provides in pertinent part:

> Any attorney . . . who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorney's fees reasonably incurred because of such conduct.

28 U.S.C. § 1927.

The sanctionable acts alleged by NASCO are certainly outside the reach of this statute. First and most important, only sanctionable acts alleged against attorneys can be considered. Chambers, the principal conspirator, the driving force, and the only person whose interests were served by the conspiracy and the sanctionable acts alleged, is outside the scope of the statute. This alone is sufficient to reject the statute as a basis for our consideration of sanctions. In addition, the act is not broad enough to cover substantive acts against the Court: acts which degrade the judicial system; atttempts to deprive the Court of jurisdiction, fraud, misleading and lying to the Court, and surreptitious taping of conversations with the Court. In addition, the only type of sanction provided is *excess* costs, expenses and attorney's fees. Sanctions other than expenses and attorney's fees may be more appropriate. We find 28 U.S.C. § 1927 insufficient as a basis for our consideration of the acts alleged in this proceeding to be sanctionable.

35. Inherent Powers. It is well established that Courts possess the inherent power to levy sanctions in response to abusive litigation practices. *Rodeway Express, Inc. v. Piper*, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980). *See Batson v. Neal Spelce Associates*, 805 F.2d 546, 550 (5th Cir. 1986); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 559-60 (5th Cir. 1981). *See also, Link v. Wabash Railroad Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962); *Miranda v. Southern Pacific Transportation Co.*, 710 F.2d 516 (9th Cir. 1983); *McCandless v. Great Atlantic and Pacific Tea Co., Inc.*, 697 F.2d 198 (7th Cir. 1983).



The wielding of that inherent power is particularly appropriate when the offending parties have practiced a fraud upon the court.

> The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 88 L.Ed. 1250, 64 S.Ct. 997. . . . No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the *entire cost* of the proceedings could justly be assessed against the guilty parties. Such is precisely a situation where "for dominating reasons of justice" a court may assess counsel fees as part of the taxable costs. *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 167, 83 L.Ed. 1184, 1187, 59 S.Ct. 777.

*Universal Oil Products Co. v. Root Ref'g Co.*, 328 U.S. 575, 66 S.Ct. 1176, 90 L.Ed. 1447, 1452 (1946) (emphasis added). *See Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245, 64 S.Ct. 997, 88 L.Ed. 1250, 1255 (1944); *Jupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972); *United Bus. Communications v. Racal-Milgo, Inc.*, 591 F. Supp. 1172, 1187 (D. Kan. 1984); *Eppes v. Snowden*, 656 F. Supp. 1267, 1277-79, 1281-82 (E.D. Ky. 1986).

Such power is incident to the court's "duty to protect the integrity of the judicial process." *Delphin Plumbing Co. v. Financial Corp. of North America*, 508 F.2d 1326, 1327 (5th Cir. 1975). *See Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 562-63 (3d Cir. 1985) (inherent power derives from "judicial powers pursuant to Article III," from "the nature of the court," and from "necessity" or practicality). Accordingly, the inherent power of a court "over members of its bar is at least as great as its authority over litigants." *Rodeway Express*, 447 U.S. at 766, 65 L.Ed.2d at 501. The Fifth Circuit has held:

> The inherent power of a court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it. The *Woodham* case [*Woodham v. American Cystoscope Co.*, 335 F.2d 551 (5th Cir. 1964)] at p. 557, says that "courts may resort to disciplinary action against the erring attorney," and quotes with approval the following from Sanctions at Pre-Trial Stages, 72 Yale L. Jour. 819, 830:
>
>> "* * * In addition, alternative modes of discipline against the attorney might include: (1) a reprimand by the court, (2) a finding of contempt, or (3) a prohibition against practicing for a limited time before the court whose order was neglected or disregarded. It seems fairly clear that the judicious use of such measures would tend to promote attorney compliance in the first instance."

*Flaksa v. Little River Marine Construction Co.*, 389 F.2d 885, 888-889 (5th Cir. 1968), *cert. denied*, 392 U.S. 928, 88 S.Ct. 2287, 20 L.Ed.2d 1387 (1968) (footnote omitted).



The *Flaksa* court quoted with approval the dissent of Chief Judge Biggs in *Gamble v. Pope & Talbert*, 307 F.2d 729, 735 (3d Cir. 1962) (en banc):

> "The power of a court to discipline members of its own bar can scarcely be doubted seriously. An attorney is under no obligation to seek admission to the bar of a United States district court. He is at liberty to abstain from membership in that or any other bar. But when he does apply and is admitted he secures certain privileges and also assumes definite obligations.
>
> "The power of a court to impose appropriate and reasonable sanctions upon those admitted to its bar is a familiar phenomenon and lies within the inherent power of any court of record. * * *"

*Flaksa*, 389 F.2d at 888 n.10. *See also, Rodeway Express*, 477 U.S. at 766 n.12, 65 L.Ed.2d at 501 n.12 (citing Chief Judge Biggs' dissent in *Gamble* with approval). In *Gamble*, the Third Circuit held that, absent formal contempt proceedings, a district court lacked inherent power to sanction an attorney for violating a court rule. Recently, the Third Circuit noted that *Gamble* had been roundly criticized and rejected and so, over-ruled *Gamble*: "the importance and necessity of some kind of sanction as one of the reasonable and flexible instruments for curbing abuse of the judicial process suggests that *Gamble* should no longer control . . . ." *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 568 (3d Cir. 1985) (en banc). In short, our inherent authority to discipline attorneys in response to abusive litigation practices cannot, at this late date, be questioned. *See, Ex Parte Burr*, 22 U.S. (9 Wheat.) 529, 6 L.Ed. 152 (1824); *Ex Parte Secombe*, 60 U.S. (19 How.) 9, 15 L.Ed. 565 (1856).

"We do not doubt the power of the court to punish attorneys as officers of the same, for misbehavior in the practice of the profession. This power has been recognized and enforced ever since the organization of courts, and the admission of attorneys to practice therein." *Ex Parte Bradley,* 74 U.S. (7 Wall.) 364, 19 L.Ed. 214 (1869). *See State v. Cannon,* 206 Wis. 374, 240 N.W. 441 (1932) (reviewing cases from the Middle Ages to the nineteenth century on inherent power of courts to disbar attorneys). "The court's control over a lawyer's professional life derives from his relation to the responsibilities of a court." *Theard v. U.S.,* 354 U.S. 278, 281, 77 S.Ct. 1274, 1 L.Ed.2d 1342, 1344 (1957).

> The authority of the court over its attorneys and counselors is of the highest importance. They constitute a profession essential to society. Their aid is required, not merely to represent suitors before the courts, but in the more difficult transactions of private life. The highest interests are placed in their hands and confided to their management. The confidence which they receive and the responsibilities which they are obliged to assume, demand not only ability of a higher order, but the strictest integrity. The authority which the courts hold over them, and the qualifications required for their admission, are intended to secure those qualities.

*Randall v. Brigham,* 74 U.S. (7 Wall.) 528, 540, 19 L.Ed. 285, 293 (1869). Finally, as noted by the Supreme Court, "[c]ourts have long recognized an inherent authority to suspend or disbar lawyers." *In re Snyder,* 472 U.S. 634, 643, 105 S.Ct. 2874, 86 L.Ed.2d 504, 512 (1985) (citing *Ex Parte Garland,* 4 Wall 333, 378-79, 18 L.Ed. 366 (1867) and *Ex Parte Burr,* 9 Wheat 529, 531, 6 L.Ed. 152 (1824)). *See also,* Local Rule 3, Disbarment; *U.S. v. Klubock,* 832 F.2d



649, 652 (1st Cir. 1987).[11]

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11. Where, as here, the allegedly sanctionable acts were committed in the conduct and trial of the very proceeding in which sanctions are sought, no prior notice to the defendants is required. This is the customary procedure and the very procedure followed by the appellate court when, on August 6, 1986, it found the appeal in this case to be sanctionable. The court has the power, without prior notice, to assess sanctions in order to regulate and protect its jurisdiction and the orderly and judicious conduct of proceedings before it.

This sanction proceeding is based upon an existing, or pre-existing, record. The defendants have full knowledge of that record. No prior notice of that record of potentially sanctionable conduct is herein required. Our "power to disbar an attorney proceeds upon very different grounds 'from those which support a court's power to punish for contempt.' " *Cammer v. U.S.,* 350 U.S. 399, 408 n.7, 76 S.Ct. 456, 100 L.ED. 474, 480 n.7 (1956) (quoting *Ex Parte Robinson,* 86 U.S. (19 Wall.) 505, 512, 22 L.Ed. 205 (1873)). Therefore, we hold that criminal contempt procedures are not here required. *See Donaldson v. Clark,* 819 F.2d 1551 (11th Cir. 1987). *Cf. Ex Parte Wall,* 107 U.S. 265, 288, 2 S.Ct. 569, 27 L.Ed. 552, 561 (1883) ("The proceeding is not for the purpose of punishment, but for the purpose of preserving the courts of justice from the official ministration of persons unfit to practice in them").

Nonetheless, we set a hearing for April 11, 1988 to (1) determine the monetary total of double costs and attorney's fees assessed as sanctions by the appellate court and to (2) determine whether sanctions were appropriate and justified by the conduct of defendants in our Court. All parties were aware that the matter would be tried by this Court on the record and the proceedings in this case, including NASCO's memorandum of fees and expenses, which the Court ordered to be filed on or before March 8, 1988. Also on order of the Court, NASCO and the sanctioned defendants filed suggested findings of fact and conclusions of law. Not one of these defendants presented a defense based on lack of due process or lack of notice of the specific charges. In fact, due process has never been an issue in this matter. However, in our consideration of whether sanctions were appropriate, we determined that the conduct of certain of these defendants and their abuse and misuse of judicial machinery and procedures might require disbarment or suspension from appearance in this Court. Such a sanction obviously would involve governmental deprivation of a liberty or property interest. With this in mind, on December 12, 1988 we notified the parties of the legal basis for

36. On our own initiative and utilizing the inherent powers of this Court, we have found sanctions, as well as the type and amount of sanctions, and in doing so have followed the following criteria:

a. When we have used the word "delay" in our discussions above, we refer to that period ending on the date on which the Act of Sale was finally executed, namely, August 27, 1986. That is the day on which the sale originally envisioned in the Purchase Agreement was finally completed. Although the suit continued thereafter, this continuation was necessary only for the purpose of deter-

Footnote 11 continued.
sanctions and of the range of sanctions, including disbarment, which we were considering. We invited the parties to submit memoranda of authority on or before December 22, 1988 and such memoranda were duly received from NASCO and from the defendant attorneys.

We have so acted because procedural due process requires notice and an opportunity to be heard before any governmental deprivation of a liberty or property interest. *Biddie v. Connecticut*, 401 U.S. 371, 379, 91 S.Ct. 780, 28 L.Ed. 2d 113, 119 (1971). *Ex Parte Bradley*, 74 U.S. (7 Wall.) 364, 372-74, 19 L.Ed. 214 (1869). But the "very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 6 L.Ed. 2d 1230, 1236 (1961). *See also, Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed. 2d 484 (1972); *Mathews v. Eldridge*, 424 U.S. 319, 334, 96 S.Ct. 893, 902, 47 L.Ed. 2d 18 (1976). Instead, the "adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct," *Link v. Wabash Railroad Co.*, 370 U.S. 626, 632, 82 S.Ct. 1386, 8 L.Ed.2d 734, 739 (1962).

Given the full knowledge of the record possessed by all defendants, given the hearing held on April 11, 1988, and given the opportunity afforded defendants to file further memoranda on or before December 22, 1988, we hold that the requirements of due process have been amply met in this matter.



mining delay damages due NASCO under the laws of the State of Louisiana for CTR's failure to complete the sale until August 27, 1986, and secondly, for the determination of sanctions which is still in progress. The attorney's fees and expenses charged to NASCO by its attorneys for both of these procedures flowed from and were a direct result of this suit. We shall include them in the attorney's fees sanctions. *See* note 11 supra.

b. We have limited sanctions against attorneys to those attorneys who were designated or acted as the trial attorneys in this matter. Numerous other attorneys in the firms of these trial attorneys have filed and/or signed pleadings and other papers which appear of record. They may be guilty of sanctionable acts but the record does not disclose the character or the extent of participation by these attorneys. It is certain that many of them signed and/or filed pleadings and papers as a matter of convenience or by the direction of the trial attorney. We consider sanctions in this suit to be a very heavy penalty which should be imposed only after serious consideration based on unimpeachable and weighty evidence and a definite conviction that they are necessary and appropriate under the circumstances in which the sanctioned acts were performed.

c. Certain attorneys may have been charged or mentioned in the sanction proceedings. Considering the fact that these are not criminal proceedings, that this Court is considering very heavy sanctions, that the very fact that the attorney was charged could bring upon him the sting of disrepute, we have determined to make no mention of charges or the names of such attorneys against whom no sanctions are imposed.

d. All attorneys who have been admitted to the bar

of the United States District Court for the Western District of Louisiana and who, therefore, appear on the list of attorneys who have been accepted for practice before this Court take either an affirmation or oath of the following tenor: "I do solemnly swear (or affirm) that I will demean myself as an attorney and counsel of this Court, uprightly and according to law, and that I will support the Constitution of the United States. So Help Me God." One attorney, McCabe, is a resident of and a member of the bar of the State of Massachusetts; was by special order of this Court allowed to represent CTR and Chambers in this proceeding; did not take the oath above but did, we are sure, take a similar oath when he was formally qualified to practice. He, like the other attorneys, is considered an officer of the Court and expected by the Court to conduct himself as such.

e. We have stated above that Fed. R. Civ. P. 11 was amended in 1983 to reduce the reluctance of courts to impose sanctions by emphasizing the responsibilities of attorneys and reenforcing those obligations through the imposition of sanctions. *Thomas v. Sec. Services, Inc., supra.* The spirit which induced the amendment of Rule 11 in 1983 should not be limited to that Rule. The Courts should not hesitate to address and sanction similar transgressions in whatever the judicial theater they may occur. This case is as classic an example of vicious, deliberate, deceitful, fraudulent and sanctionable conduct as the Courts can produce.

37. Trial by ordeal, that most ancient, most archaic and barbaric practice, has been for centuries in disrepute. We have before us its modern counterpart. Although NASCO did not have to survive the ordeal of boiling water or searing flame without visible harm, it has suffered its modern counterpart. NASCO possessed an admittedly



legal and valid contract. Chambers arbitrarily and without legal cause refused to perform, forcing NASCO to bring its suit for specific performance. Chambers, through his attorneys, filed answers and counterclaims alleging defaults by NASCO which both Chambers and his attorneys knew were false at the time they were filed. We have referred previously to the immense volume of pleadings and evidentiary material in this and other Courts. NASCO suffered delay damages which by agreement of the parties amounted to $850,000.00. NASCO has been forced to spend approximately a million dollars in attorney's fees and expenses in this Court alone to win a suit in which defendants did not introduce one item of evidence to dispute its right to specific performance. This is a trial by ordeal. How many plaintiffs could suffer the oppression and harassment required to fight this case to a finish? The attorneys who engineered this mockery are a disgrace to the profession. This is not rhetoric. This is fact. This is tragedy. Sanctions should be sufficiently severe to convince others that such tactics shall not be tolerated in the Courts of these United States. The sanctions assigned and established in this paragraph apply only to sanctionable acts which occurred in connection with the proceedings in the trial Court.

a. G. Russell Chambers - We need not review the conduct of Chambers. Although this entire opinion is a chronical of his sanctionable acts, these acts, as well as those of the other sanctioned defendants, are recapitulated in brief form in paragraphs 26-28 supra. Chambers, knowing that NASCO had a good and valid contract, hired Gray to find a defense and arbitrarily refused to perform, thereby forcing NASCO to bring its suit for specific performance and injunctive relief. Chambers and Gray misused the notice by NASCO of its application for injunctive relief to set up the fraudulent public records defense. This was

the first battle in their long and arduous campaign of fraud, deceit, delay, harassment, oppression and expense, culminating finally on August 27, 1986 when the sale to NASCO finally was completed. We assess as sanctions for Chambers' unlawful conduct attorney's fees and expenses of $996,644.65. This sum is exclusive and does not include fees and expenses previously awarded by this Court in the contempt proceedings in the amount of $4,754.00, or the attorney's fees and expenses awarded as sanctions by the Court of Appeals which we have determined to be $66,223.02. The figure does include, however, $53,459.68 in attorney's fees and expenses paid by NASCO for services rendered in connection with the sanctions portion of this suit. This latter portion of the fees and expenses, like the balance of such fees and expenses included in the sanctions, would not have been incurred by NASCO if Chambers had not defaulted and forced NASCO to bring this suit. There is absolutely no reason why Chambers should not reimburse in full all attorney's fees and expenses that NASCO, by Chambers' action, was forced to pay.[12]

These fees and expenses were paid by NASCO to its attorneys. They were assembled, documented and sent to each of the defendants by order of the court on March 8, 1988 and prior to the hearing of April 11, 1988. NASCO paid them without protest and Chambers has not challenged the amount. Nor is it required that the attorney's

12. We have also considered monetary sanctions to compensate the United States for waste of judicial resources caused by this suit. Such sanctions are not without precedent, at least under Rule 11. *See Robinson v. Moses*, 644 F. Supp. 975, 982 (N.D. Ind. 1986); *Dominguez v. Figel*, 626 F. Supp. 369, 374 (N.D. Ind. 1986); *Thiel v. First Federal Savings & Loan Assoc. of Marion*, 646 F. Supp. 592, 598 (N.D. Ind. 1986). In fact, Courts have routinely ordered an award of a part of such costs when settlements are reached on the first day of trial and jury costs are awarded.



fees meet the standard set forth in *Johnson v. Georgia Highway Express, Inc.*, 448 F.2d 714 (5th Cir. 1974). *Davis v. Veslan Enterprises*, 765 F.2d 494 (5th Cir. 1985), and *Hornbuckle v. Arco Oil & Gas Co.*, 732 F.2d 1233 (5th Cir. 1984).

The amount of the sanction is substantial but it is no more substantial than were the bills when NASCO was obliged to pay them. We agree with the statement of Judge Goldberg in *Schwartz v. Folloder*, 767 F.2d 125, 133-134 (5th Cir. 1985), as follows:

> After Alexander Grant's attorney requested attorney's fees, the court sarcastically commented, "You mean to say your client has spent four hundred thousand dollars defending a lawsuit that it determined a long time ago was frivolous?" 13 Rec. at 4. Given this statement, it is possible that the court denied attorney's fees on the ground that Grant was wrong to spend so much money in defending a suit that had been frivolously filed. If so, the district court was in error. We agree with the sentiments expressed in *Dayan v. McDonald's Corp.*, No. 70CH 2258 (Ill. Cir. Ct. March 1, 1983):
>
>> It is unbecoming for the plaintiffs to hail the defendant into court by means of false allegations and then to complain when the defendant hires skillful, experienced and expensive advocates to defend against those allegations. Having wrongfully kicked the snow loose at the top, [the plaintiff] must bear the consequences of the avalanche at the bottom.

The shoe fits a frivolous defense as well as it does a frivolous cause of action.

b. Mable Christine Baker - Baker was an indispensable and willing party to the scheme and conspiracy, although she knew none or little of the significance of her participation. Her sanction is our reprimand.

c. A. J. Gray, III - The defendants in this case who are attorneys are distinctly different from the other defendants under consideration. An attorney is schooled in the law. Because of his unique relationship with his clients and with the public, he is taught ethics and governed by rules of professional ethics. The Court has a right to expect him, as an officer of the Court, to lend his assistance in preserving order and decorum in the Court; to be truthful and forthright with the Court and other counsel; to be truthful and not mislead the court or other counsel. His signature certifies that pleadings and other documents filed by him are "to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Rule 11. He is bound to preserve the integrity of the law and the Constitution of the United States and the several states and to seek justice in his representation of clients before the Court. In his conduct in this case, Gray has actively violated almost every one of these ethical and professional responsibilities. He accepted and tried a case for the explicit purpose of doing injustice, i.e., he used every means at his disposal to defeat a perfectly legal and enforceable purchase contract against which he well knew his client had no defenses. He misused the injunction notice given by NASCO. He devised a fraudulent and illegal scheme to deprive this Court of the jurisdiction which it had at the time NASCO's notice was delivered on Friday, October 14, 1983. The sale to the Trust



as attempted was an absolute simulation and totally void and incomplete at the time it was recorded. It was recorded in haste for the purpose of rendering the impending injunction ineffective. He not only failed to disclose essential and pertinent facts, he actively misled the Court and recorded his conversation with the Court without disclosing to the Court his intent to do so. By these actions the Court was forced to delay action on the merits until it was determined by trial that the Court again had jurisdiction. During this delay Gray utilized his legal skills and experience to lead, on behalf of Chambers, a campaign of harassment, oppression and delay sufficient to force NASCO to spend over a million dollars in attorney's fees and expenses to defend its rights to the performance of a perfectly legal and enforceable contract. More amazing, this was accomplished without the introduction by defendants of one single item of evidence against the validity of the Purchase Agreement. This case is unique. The manner in which it was conducted by Gray is a disgrace to the legal profession. It is our reluctant duty as a sanction to disbar Gray from practice as an attorney in the Western District of Louisiana; to order that his name be stricken from the roll of the attorneys authorized to practice before this Court, and that he be prohibited, for a period of three years from the date upon which this case becomes final, from making application for readmission to the rolls of the this Court.

d. Richard A. Curry - Curry knew all the details of the public records defense and participated in the campaign of harassment and oppression. But, he initiated nothing on behalf of Chambers. Customarily he filed his pleadings merely in support of pleadings previously filed by Gray.

Under his representation the Trustee, Baker, remained the willing tool of Chambers through the duration of the litigation and knew no more about her responsibilities as

Trustee at the end of the litigation than she did the first day that Curry was hired. We assign as a sanction that Curry be suspended from practice as an attorney in the Western District of Louisiana for a period of six (6) months but that his name remain on the rolls of the attorneys qualified and admitted to the practice before this Court so there will be no need for an application for readmittance.

e. Edwin A. McCabe - McCabe is a resident of and practices law in Boston, Massachusetts. He does not appear on the rolls of the attorneys authorized to practice before this Court but by the order of this Court on July 16, 1986 he was admitted for the purpose of representing Chambers in this specific suit. On this date, some eight months after the issuance of our Judgment on the Merits of November 27, 1985, Chambers was still resisting performance of the purchase contract. We, on motion of NASCO, were lending our assistance to promote that performance. The sole issue to be tried at the July 16, 1986 hearing was whether operating equipment which had replaced worn or outdated equipment described in the 1983 Purchase Agreement was to be included in the sale to NASCO. The Court had overruled several pretrial motions filed by McCabe and, before commencing the actual hearing, warned McCabe that we had experienced a great deal of unethical conduct throughout the trial of this case and would tolerate no further acts of that nature. Despite these warnings, two highly unethical acts occurred during the hearing. During a three day recess after the 16th, all of the equipment at issue in the hearing was removed and taken off line and the worn-out or outmoded equipment described in the 1983 Purchase Agreement was placed in operation. This was done on the admitted advice of McCabe without the consent of the Court or opposing counsel and, indeed without informing either of them. We deemed this to be an act of arrogance, in direct violation of the warning by the Court,



and we ordered the immediate reinstallation of the equipment which had been removed.

Thereafter, an attempt was made to prove that the equipment in question was not owned by CTR but was owned by another corporation wholly owned by Chambers and leased at various times since August 1983 by that corporation to CTR. Three witnesses, Mrs. Chambers, CTR's independent CPA and a long-time employee of CTR, testified in support of this contention. It was proved beyond doubt that all of this testimony was perjury, that all of the leases were fraudulent. None of the leases had been drafted or executed prior to 1986, a date which, incidentally, followed our final judgment on the merits.

Thereafter McCabe filed other baseless pleadings and appealed our deision on the July 16 hearing, all as is described in more detail in paragraphs 26, 27 and 28 supra. McCabe terminated his representation when the Appellate Court issued its decree of August 6, 1986. His appeal and all of his pleadings were immediately recalled by him. Nevertheless, his transgressions were serious and we assign as a sanction our severest reprimand against him for his actions, and declare him ineligible to practice in the Western District of Louisiana for a period of five (5) years.

38. We determine the amount of attorney's fees and double costs assessed as sanctions by the United States Court of Appeals for the Fifth Circuit against appellant G. Russell Chambers to be attorney's fees in the amount of $66,159.39, and double costs in the amount of $127.26, accuring in sum to $66,286.65.

39. A certified copy of this Opinion and the Judgment to follow shall be sent by the Clerk of Court to: (1) the Office of Bar Counsel, Daniel Klubach, Board of Bar

Overseers of the Supreme Judicial Court, 11 Beacon Street, Boston, Massachusetts 02108, and (2) the Supreme Court of Louisiana, 109 Supreme Court Building, 301 Loyola Avenue, New Orleans, Louisiana 70112-1887.

DONE AND SIGNED at Alexandria, Louisiana, this 23rd day of January, 1989.

copy sent - 1-25-89

/s/ Norman Scott
UNITED STATES DISTRICT JUDGE



## APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-4137

NASCO, INC.,

Plaintiff-Appellee,

versus

CALCASIEU TELEVISION & RADIO, INC., and G. RUSSELL CHAMBERS,

Defendants-Appellants,

and

RICHARD A. CURRY, EDWIN A. McCABE, and A.J. GRAY, III,

Appellants.

Appeals from the United States District Court for the Western District of Louisiana

(February 6, 1990)

Before WISDOM, JOHNSON, and HIGGINBOTHAM, Circuit Judges.

HIGGINBOTHAM, Circuit Judge:

Calcasieu Television and Radio, Inc. and its sole shareholder and director, Russell Chambers, appeal the district court's award of attorneys' fees to NASCO based on Chamber's bad faith in conducting his defense to NASCO's breach of contract suit. We find that the district

court has inherent power to prevent frustration of its judicial duty by a party. We also conclude that although jurisdiction in this suit rested on diversity of citizenship the district court may without reference to Louisiana law award attorneys' fees to the party forced by the obstructive tactics to incur them. A. J. Gray, Edwin McCabe, and Richard Curry appeal the district court's order disbarring them for various periods for their conduct of the defense. We hold that the district court afforded them due proces, that its findings are supported by clear and convincing evidence, and affirm the disbarment order. In setting the length of McCabe's disbarment the district court considered that he is a resident of Massachusetts and would seldom have occasion to appear in the Western District of Louisiana. After the order was issued, however, the Massachusetts Bar ordered McCabe to show cause why it should not impose identical discipline. We do not know whether this turn of events may work an unintended result. In the interest of fairness, we remand to enable the district court to consider the length of McCabe's disbarment in light of this development.

I

On August 9, 1983, CTR and NASCO agreed to the sale to NASCO of CTR's television station. The agreement required CTR to file required forms with the FCC by a specified date, but it did not do so.

On Friday, October 14, 1983, NASCO notified Chambers that it would file suit in the district court seeking specific performance and would request a temporary restraining order preventing Chambers and CTR from encumbering property subject to the contract. Over the weekend, Chambers and his attorney, Gray, created a trust with Chambers's sister, Mabel Baker, as trustee. CTR then



conveyed to the trust all of its immovable property subject to the contract of sale. On Monday morning, Chambers and Gray filed warranty deeds in the proper parish offices showing the transfer to the trust. NASCO filed its suit later that morning. At noon, the district judge conducted a telephone conference with NASCO's attorney and Gray regarding a temporary restraint of property transfers. Gray did not disclose in the conference that CTR was already transferring property to the trust.

On Monday afternoon, Chambers flew to Birmingham, where Baker signed the documents necessary to her appointment as trustee. She then signed a $1.4 million note on behalf of the trust for the purchase of the property.

On Tuesday, Gray informed the court of the transfers and that he had withheld the information during the telephone conference. NASCO amended its complaint to name Baker as a defendant and on October 24, the district court issued a preliminary injunction enjoining Chambers and CTR from encumbering the property, and an order restaining Baker from alienating or otherwise encumbering the property. On the next day, baker nevertheless entered into a leaseback agreement with CTR.

In November 1983, NASCO sought access to CTR's general ledger and 1982 income tax return, but Chambers through Gray, refused. The October 24 preliminary injunction ordered CTR and Chambers to grant NASCO access to any documents or records related to the assets purchased under the contract. The district court held these records were clearly within the scope of the injunction and fined Chambers and CTR after NASCO instituted a civil contempt proceeding. *NASCO, Inc. v. Calcasieu Television & Radio,* 583 F. Supp. 115 (W.D. La. 1984). Chambers brought two unsuccessful appeals of this order, under

§ 1292(b) and § 1291. See *NASCO, Inc. v. Calcasieu Television & Radio*, slip op. No. 84-9037 (5th Cir. May 29, 1984) and *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 752 F.2d 157 (5th Cir. 1985).

The attorneys then filed four motions for summary judgment. Gray filed two on behalf of Chambers, Curry filed one on behalf of Baker, and Gray filed one on behalf of Chambers and Baker. In each motion, they argued that since the deeds of the station's property to the trust had been recorded before the NASCO-CTR contract, the public records doctrine barred specific enforcement of the contract. Before the hearing on the motions for summary judgment, NASCO filed an affidavit attacking Baker's credibility which Curry moved to strike; the court denied the motion. The district court then concluded that the transfer to the trust was a sham and denied summary judgment.

In August 1984, Gray moved for a protective order and for clarification of the scope of the October 24 preliminary injunction. After a hearing, the court denied that motion as well. Gray then filed on behalf of Chambers several compulsory counterclaims which proved to be baseless; indeed some had no relevance to the proceeding. For example, these claims included arguments that NASCO's conduct of its FCC ascertainment survey was improper, that NASCO would be unable to pay the purchase price, that NASCO had misrepresented its plans for the station, and that NASCO was not committed to the community interest. Chambers and Gray did not drop these claims until the eve of trial, when they admitted the contract was valid.

About the same time, Gray noticed the depositions of officials of Manufacturers Hanover, the financing bank for NASCO's purchase. McCabe, Chambers's Boston



counsel, asserted that he took these depositions to determine NASCO's ability to pay the purchase price. Gray also took the depositions of five members of NASCO's board of directors, to determine whether the NASCO officer who had signed the purchase contract had been authorized to do so.

Throughout, Gray sought continuances, extensions of pleading deadlines, and deferments of scheduled discovery. After the district court finally set trial for February 27, 1985, Gray filed a motion to recuse the trial judge for bias and prejudice, which the trial court denied. Chambers and CTR sought a writ of mandamus from this court ordering recusal. Curry filed an "answer" to the petition on behalf of Baker, who was technically a respondent, in which he also urged that the writ be granted. This court denied the petition, calling it meritless. *In re Calcasieu Television & Radio, Inc. and G. Russell Chambers*, slip op. No. 85-4128 (5th Cir. February 25, 1985). The motion and the petition again delayed the trial. Chambers then listed 100 trial witnesses in the pretrial order. The case went to trial April 17-18, 1985 and only two of the 100 appeared to testify.

At trial, Chambers, CTR, and Baker argued only the public records doctrine defense. The district court rendered judgment on November 8, 1985, restoring the status quo and ordering specific performance. *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 623 F.Supp. 1372 (W.D. La. 1985). Chambers, Baker, and CTR appealed.

Soon after judgment, Chambers, without notice to NASCO, petitioned the FCC to construct a new transmission tower for the station and to relocate the station's transmission facilities. This change to a new site was not covered by the purchase contract, and would have material-

ly altered the status quo in violation of the district court's judgment. The district court's informal intervention and NASCO's threat to seek further contempt sanctions persuaded Chambers to drop his petition.

On November 27, 1985, Chambers and Baker, through Gray and Curry, moved for a stay of the execution of the judgment pending appeal. The trial court denied the motion, and this court denied writs of mandamus sought by Chambers and by Curry on behalf of the trust. Chambers then petitioned Justice White to stay the judgment. Justice White denied the petition. *In re Calcasieu Television & Radio, Inc. and G. Russell Chambers v. NASCO, Inc.*, No. A-611 (White, J., in Chambers, February 18, 1986) (unpublished opinion). Chambers and CTR fired Gray in March 1986 and Russell Tritico replaced him as their counsel of record. Tritico was later joined by McCabe.

In late spring 1986, while the appeal to this court from the judgment on the merits was still pending, a dispute arose between Chambers and NASCO over the station's equipment to be transferred under the contract. In the nearly three years since the agreement for the sale, several pieces of equipment listed in the contract had been taken out of service. NASCO contended that replacement equipment had to be conveyed, but Chambers refused. NASCO requested the court's aid in completing the sale. On the morning of the resulting hearing, McCabe filed a motion in opposition and a supporting memorandum, a request for jury trial on the motion, and a motion *in limine* to exclude evidence of assets not listed in the contract. The trial court denied these motions, finding them to be frivolous. The court also warned McCabe, who was making his first full appearance in the case, that the defense had already engaged in bad faith, dilatory tactics and the court would tolerate no more.



During the hearing, from July 16-22, Chambers and CTR, at McCabe's direction, removed all of the disputed equipment from service at the station. McCabe now argues that this was to prove that the equipment was not necesssary to the station's operations and thus not subject to the contract. Whatever the reason, removing the equipment, without any notice to the court or NASCO, directly violated the orders of the district court. The district court ordered Chambers and CTR to restore the equipment to service.

At the hearing, two CTR officials, called by McCabe, testified concerning the use and ownership of the disputed assets as part of an effort to prove CTR did not own them but rather leased them from another Chambers corporation, CAL-TV. McCabe introduced seventeen equipment leases as part of this effort. The trial court denied the motion, concluding that the leases were fraudulent and the testimony false. The trial court granted NASCO's motion.

On July 28, 1986, with NASCO's motion pending, McCabe sent a letter to NASCO's counsel stating Chambers intended to close the sale on August 4, 1986 and convey only the assets originally listed in the contract. This apparent effort to set up a termination of the sale by Chambers under the termination provisions of the contract failed. The trial court granted NASCO relief from the timing and termination provisions of the contract.

On August 6, 1986, this court affirmed the district court's judgment on the merits, imposed sanctions under Fed. R. App. P. 38 for a frivolous appeal, and remanded for a determination of the amount of these sanctions. The remand included an instruction to consider the applicability of Rule 11, Fed. R. Civ. P., and 28 U.S.C. § 1927 to Chambers, Baker, or their counsel for their conduct in the

trial court. We did not intend by this specific instruction to limit the district court's sanctioning power to that provided in the statute. *NASCO v. Calsasieu Television and Radio,* slip op. No. 86-4003 (5th Cir. August 6, 1986).

On December 29, 1987, NASCO moved for sanctions against Chambers, Baker, McCabe, Gray, and Curry resting on section 1927, Rule 11, and the court's inherent power. The court held an evidentiary hearing on the motion on April 11, 1988. All of the parties filed briefs and submitted documentary evidence, affidavits, and testimony. On December 12, 1988, the court filed a minute entry soliciting additional arguments on the availability and propriety of non-monetary sanctions, namely suspension and disbarment of the attorneys. Each party except McCabe responded.

On January 23, 1989, the district court ordered Chambers to pay $66,286.65 in appellate sanctions and $996,644.65 in attorney's fees and related expenses, reprimanded Baker, disbarred Gray for three years and Curry for six months, and declared McCabe ineligible to practice in the Western District of Louisiana for five years. The court did not rest on statute or rule but found that it had the inherent power to issue the order. Louisiana and Massachusetts have ordered Gray and McCabe respectfully to show cause why they should not impose identical discipline. Those orders have been stayed pending the outcome of this appeal.

II

Chambers argues that the district court's award of attorneys' fees was not authorized by controlling Louisiana law. He contends that in a diversity case, a district court may not impose attorney's fees for bad faith litigation



practices under its inherent power, but must look to state law. Louisiana allows attorneys' fees only when a contract or statute specifically provides for them. *Quealy v. Paine, Webber, Jackson, and Curtis, Inc.,* 475 So. 2d 756 (La. 1985); *Huddleston v. Bossier Bank and Trust Co.,* 475 So.2d 1082 (La. 1985). It does not recognize an exception for bad faith practice. It is undisputed that neither the contract nor any Louisiana statute here provides for attorneys' fees.

In *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240 (1975), the Court noted that federal courts follow the "American Rule" that the prevailing party is not permitted to recover attorneys' fees, with a few exceptions, including an inherent power to impose attorneys' fees upon a losing party who has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons." 421 U.S. at 258-259 (quoting *F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co.,* 417 U.S. 116, 129 (1974)). This exception applies both when the bad faith occurs in the transaction giving rise to the suit and when a party litigates in bad faith. *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 766 (1980). A footnote, however, confuses the *Alyeska* ruling at least in divesity cases:

> "[I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorney's fees or giving a right thereto, which reflects a substantial policy of the state, should be followed." Prior to the decision in *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), this Court held that a state statute requiring an award of attorneys' fees should be applied in a case removed from the state courts to the federal courts: "[I]t is clear that it is the policy of the state to allow plaintiffs to recover an at-

> torney's fee in certain cases, and it has made that policy effective by making the allowance of the fee mandatory on its courts in those cases. It would be at least anomalous if this policy could be thwarted and the right so plainly given destroyed by removal of the cause to the federal courts." ... We see nothing after *Erie* requiring a departure from this result. The same would clearly hold for a judicially created rule, although the question of the proper rule to govern awarding attorneys' fees in federal diversity cases in the absence of state statutory authorization loses much of its practical significance in light of the fact that most States follow the restrictive American rule.

421 U.S. at 259, n.31 (citations omitted).

We are not persuaded that the Court intended to upset the view, nigh unchallenged in the history of the country, that federal courts have inherent power to police themselves by civil contempt, imposition of fines, the awarding of costs and the shifting of fees. Specifially, we are unpersuaded that the award of fees to a party injured by the opposing party's conducting a civil suit in a manner obstructive of justice necessarily implicates the substantive policy of states in diversity cases.

It is a given that federal courts enjoy a zone of implied power incident to their judicial duty. From the Judiciary Act of 1789 forward its functional necessity has not been seriously questioned. Rather, the task is one of defining its limits. As we see it, the dimensions of the zone are best grasped by taking both a horizontal and a vertical look. The immediate contention, that awarding fees implicates Louisiana's substantive policy, raises a question of vertical limits. But its answer requires the informing presence of horizontal limits; that is, the relationship



between the source of the power and its particularization in rules governing sanctions such as Rule 11 and Rule 37 Fed. R. Civ. Proc., in rules governing contempt, and in statutes such as 28 U.S.C.A. § 1927. We turn first to the relationship between the courts' inherent power to prevent obstructive conduct and particular rules that respond to such conduct at various stages of the litigation process. We limit our discussion to the problem before us—whether Rule 11 and Section 1927 bar a district court from assessing fees against a party under its inherent power, when the party's conduct is not within the reach of the rule or the statute. We express no opinion whether, when the conduct is within the reach of either, the court may exceed these boundaries under the auspices of its inherent power.

It could be argued that the inferior federal courts may look only to rules of procedure and specific statutes providing remedies for obstructive conduct. The argument rests on the idea that Congress has the power to define the limits of the authority of inferior courts and that § 1927 and applicable rules adopted under the enabling acts reflect a congressional decision to confine the courts to the particular rules and statutes. After all, the argument goes, there is little point in defining procedures and remedies by particular rules if the courts retain a much broader "inherent power." We are not persuaded.

To the extent that inherent power is seen as a product of necessity, it contains its own limits. It is not a broad reservoir of power, ready at an imperial hand, but a limited source; an implied power squeezed from the need to make the court function. It is power "*necessary to the exercise of all others,*" *Roadway Express, Inc. v. Piper,* 447 U.S. 752, 766 (1980) (quoting *United States v. Hudson,* 11 U.S. (7 Cranch), 32, 34 (1812)) and "governed not by rule or statute but by the control *necessarily* vested in courts to

manage their own affairs." *Link v. Wabash R. Co.*, 370 U.S. 626, 630 (1962) (emphasis supplied).

Despite its linkage to necessity it is not apparent that the inherent power incident to duty is exhausted by rules addressing particular sets of problems such as Rule 11. It is true that, to the extent conduct violates an explicit statute or rule, there is no necessity for resorting to power inherent in the judicial assignment. At the same time it does not necessarily follow that inherent power starts where rule or statute ends. Conduct may be of the genre addressed by the rule, such as an inadequate investigation preparatory to the filing of a complaint or bad faith prosecution of a claim, but outside its particulars such as the required signing under Rule 11 or conduct by a party rather than the lawyer under § 1927.

Accepting that Congress can limit the power, the question inevitably turns to the intended purpose of the rule. Yet, the scope of displacement intended by a rule is often uncertain. Indeed, it is likely to be uncertain unless the statute or rule explicitly describes its preemptive reach. This is so because adopting a rule of procedure such as Rule 37 is not necessarily inconsistent with simultaneously accepting a court's inherent power to shift fees for wanton and vexatious conduct. First, adopting a rule alters the analysis of judicial reach in diversity cases, at least since *Hanna v. Plumer*, 380 U.S. 460 (1965). For this reason alone, the inference that an *addition* of congressional authority to the inherent judicial power was intended by the promulgation of a rule is at least equally as compelling as the inference that adopting the rule was intended to supplant the court's inherent power. Indeed, were the power at issue here reflected in a rule of procedure, much of our analysis would be unnecessary.



Second, the positive heuristic values of particularizing conduct that could without the rule be dealt with by a court's exercise of inherent power also dispels the notion that adopting a rule necessarily infers an intent to displace inherent power.

Third, and finally, adopting particular rules supplements inherent power in another positive manner that is the essence of rulemaking. A rulemaker may sum experiences such as inadequate investigation preparatory to the filing of a pleading and condemn its practice despite the fact that singly the acts might not be so obstructive as to warrant ad hoc judicial responses. For example, that misconduct by parties as distinguished from their lawyers had not been found to be sufficiently widespread as to warrant a rule hardly compels the inference that when it does occur, the court lacks inherent power to deal with it because the subject was addressed by a rule and the rule omitted parties. Similarly, a rule maker may reach for practices in their bud, before they come to flower. So, where a rule leaves off and the zone of inherent power picks up is not definable across the board—for all rules and statutes—and is often uncertain. That uncertainty is a reflection of uncertainty in the very idea of inherent power. At the very least it leads us to not venture beyond functional necessity as its source.

Given this uncertainty, it ought not be surprising, and it is the case that, viewed horizontally, inherent power is not a tidy doctrinal package. Two cases make the point. In *Link* the Court sustained a lower court finding of the inherent power of a district court to sua sponte dismiss a case involuntarily. That Rule 41(b) dealt with involuntary dismissals and appeared to require a motion to dismiss did not trouble the Court. Justice Harlan observed that Rule 41 was not the source of the power to dismiss. Rather, the

district court had exercised its inherent power. On the other hand, the Court in *Ex parte Robinson*, 86 U.S. (19 Wall.) 505 (1873), suggested that the rules for contempt, a specie of inherent power, were the sole source of district court authority to find contempt. That the district court could not have proceeded with contempt except by the rules for contempt does not necessarily mean, however, that it had no authority to otherwise remedy the conduct. So read, *Ex parte Robinson*, and *Link* are not inconsistent. By this reconciliation, when a court is faced with bad conduct frustrating its ability to discharge its judicial duty, it is not confined to the process of criminal contempt, but may impose other sanctions in order to control the litigation before it.[1]

Our task here is not so large that we must quiet these uncertainties. Rather, it is sufficient that we explain our caution by describing concerns surrounding the inherent power of federal courts. Having said this, and despite the uncertainty of the inherent power's full reach, we are persuaded that the rules of civil procedure and § 1927 did not displace a district court's power to shift fees for bad faith wanton and vexatious conduct in the prosecution of the case. We quickly take comfort from the reality that this much is implicit in *Alyeska*.

We turn now to the vertical view and our immediate issue—whether, as Chambers argues, the *Alyeska* Court read *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny as compelling district courts to look to state law in awarding attorney's fees for bad faith litigation prac-

1. We need not grapple here with the preclusive effect of the Rule 42 Fed. R. Crim. P. and 18 U.S.C. § 401. This was not a criminal contempt proceeding and there is no suggestion that the full range of conduct could be remedied by civil contempt.



tices in diversity cases. We are not persuaded that it did.

*Erie* broadly commanded federal diversity courts to apply state substantive law and federal procedural law. The current state of the *Erie* doctrine is reflected in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945) and *Hanna v. Plumer, supra.* In *Guaranty Trust Co.*, the Court held that, in diversity cases, *Erie* required issues significantly affecting the outcome of the litigation to be decided under state law. On the other hand, issues concerning the manner and means of enforcing the state-created substantive right in federal court were to be determined by federal law. 326 U.S. at 109. In *Hanna*, the Court refined this analysis after conceding that every procedural issue could be outcome-determinative in the proper context. The Court stated that when, as here, no federal rule controls and *Erie* analysis is therefore necessary, the outcome-determination test "cannot be read without reference to the twin aims of the *Erie* rule— discouragement of forum shopping and avoidance of inequitable administration of the laws." 380 U.S. at 468.

Predictably, the circuits have not been even in their treatment of the issue. In *Tryforos v. Icarian Development Co., S.A.*, 518 F.2d 1258 (7th Cir. 1975), *cert. denied, Manta v. Tryforos*, 423 U.S. 1091 (1976), the court considered a fee award in a shareholder's derivative action under state law for misappropriation. The plaintiff shareholders changed attorneys frequently during the litigation and otherwise sought to avoid a trial on the merits in the district court, apparently preferring some other forum. Finally, they sold their stock and, despite some objections from another shareholder, the district court dismissed the action with prejudice for failure to prosecute. The district court retained jurisdiction to award defendants $92,500 in attorneys' fees. The Seventh Circuit reversed. The court rejected the defendants' assertion that federal law governed the award,

concluding that the *Alyeska* footnote required it to apply Illinois law. 518 F.2d at 1265, n.27. The court concluded that the Illinois statute allowing fees in that circumstance did not cover the plaintiff's conduct. *Id.* at 1266.

In *Lewis v. S.L. & E., Inc.*, 629 F.2d 764 (2d Cir. 1980), the court reversed a judgment on the merits in favor of the defendants in a shareholder's derivative action. The court also reversed the attorneys' fee award, saying that it could not find a New York statute that allowed the defendants to recover their fees in this kind of derivative action; and if the district court made the award because it thought the plaintiffs brought the action in bad faith, the reversal on the merits removed that basis for the award. 629 F.2d at 773. In a footnote, the court stated "In this diversity action, state law governs the question of attorneys' fees," citing the *Alyeska* footnote. *Id.*, n. 21.

In *LaRouche v. National Broadcasting Co.*, 780 F.2d 1134 (4th Cir.), *cert. denied*, 479 U.S. 818 (1986), the plaintiff sued NBC, the Anti-Defamation League of B'Nai B'Rith, and others in a diversity action alleging defamation. He lost, and the Anti-Defamation League moved for sanctions in the form of attorneys' fees against plaintiff and his attorneys under Rule 11, § 1927, and the district court's inherent power to cope with bad faith litigation. The district court denied the motion and the Fourth circuit affirmed, finding no abuse of discretion. The court apparently assumed the district court could have imposed sanctions under its inherent power. See 780 F.2d at 1140.

In *Montgomery Ward v. Pacific Indemnity Co.*, 557 F.2d 51 (3d Cir. 1977), the defendant insurer Pacific refused to defend Montgomery Ward in a products liability action. Montgomery Ward sought a declaratory judgment that Pacific was required to defend or indemnify and to recover



attorneys' fees for both the products liability action and the declaratory judgment action. The products liability action was settled and Pacific indemnified Montgomery Ward and paid its counsel fees for that action. Montgomery Ward continued to prosecute the declaratory judgment action to recover its fees for that action. The district court awarded the fees for what it found to be Pacific's bad faith, based on its own inherent power rather than any authority derived from state law. The Third Circuit affirmed the award because it was valid under state law, but noted the district court's use of its inherent power was improper in that state law governs attorneys' fees awards in diversity cases. 557 F.2d at 56-58. Judge Gibbons concurred in the judgment, but did not agree that federal courts were *Erie*-bound to apply state law when the bad faith amounted to an abuse of process:

> I do not agree, however, that in a state which would not [recognize the bad faith exception], a federal forum would be precluded from awarding attorneys' fees for what amounts to a vexatious abuse of its process. I regard the award of attorneys' fees [here] as more in the nature of costs than are such awards under the other exceptions to the American Rule. Certainly the notions of federalism which underlie the *Erie* rule do not require that a federal forum accept the public policy of the state in which it happens to sit on a matter such as the award of costs for abuse of its process.

557 F.2d at 61.

Judge Gibbons viewed Pacific's refusal to defend or indemnify, and its defense of that position in the declaratory judgment action, as an abuse. The district court took the same approach in *Republic of Cape Verde v. A. & A. Partners*, 89 F.R.D. 14, 20 n.12 (S.D.N.Y. 1980).

Judge Gibbons did not distinguish between two aspects of the bad faith exception. As we see it, bad faith in an underlying transaction and bad faith in the prosecution of a claim present quite different problems. That is not to say that conduct in prosecuting a claim is inevitably a non-substantive matter. Federal judgments about whether a contention is substantial or frivolous can quickly implicate state choices of policy. The "procedural" trace of state policy in a federal decision is evident in the use by states of private attorneys general to enforce state standards. A state may set a low threshold to encourage such policing. A finding of bad faith prosecution as a predicate for fee-shifting when it rests on the substantiality of the contention is intertwined with state choices among means of enforcing standards for corporate conduct. *Tryforos* and *Lewis, supra,* (shareholder derivative actions) may be explained in these terms. In sum, the dichotomy of underlying transaction versus trial does not evenly separate substance from procedure and we do not suggest that it does. This is also the rationale of this circuit. *Perkins State Bank v. Connolly*, 632 F.2d 1306 (5th Cir. 1980) is not contrary. It bears emphasis that the question before the panel in *Perkins* was whether bad faith in the commercial transaction giving rise to the suit triggered feeshifting. Fee-shifting is in that circumstance a substantive policy choice by the state. The Panel properly looked to Florida law for the answer.

In this case, however, the award was based on Chambers's bad faith in the manner of conducting the litigation; it did not rest on a federal measuring of the merit in Chamber's defense. We do not see how the district court's inherent power to tax fees for that conduct can be made subservient to any state policy without transgressing the boundaries set out in *Erie, Guaranty Trust Co.*, and *Hanna*. Fee-shifting here is not a matter of substantive



remedy, but of vindicating judicial authority. Of course, use of inherent power is outcome determinative in the sense that Chambers owes fees he would not have owed had Louisiana law applied; but that is not the question after *Hanna*. *Erie* does not compel a federal court to tolerate abuses in diversity cases that the court would not tolerate in other cases; nor does it limit the range of measures at the court's disposal to vindicate its authority. It is not the business of the state and federal courts to run the other's courtroom.

Courts have approved other uses of the inherent power to control the litigation in diversity cases. In *Link v. Wabash R. Co., supra,* for example, there is no discussion of the effect of state law on the court's power to dismiss that diversity suit. We approved the exercise of the inherent power in a diversity case to declare parties absent from docket call ready for trial, again without discussion of state law. *Williams v. New Orleans Public Service, Inc.*, 728 F.2d 730 (5th Cir. 1984). In *Jochum v. Schmidt*, 570 F.2d 1229 (5th Cir. 1978), a diversity case, we affirmed the district court's exercise of its inherent power to condition a voluntary nonsuit on the payment of costs, including attorneys' fees.

In *Sibaja v. Dow Chemical Co.*, 757 F.2d 1215 (11th Cir.), rehearing denied 765 F.2d 154, cert denied 474 U.S. 948 (1985), the court held that federal forum non conveniens doctrine applied in diversity actions, in the face of an *Erie* challenge. A dismissal under that doctrine is an exercise of the court's inherent power. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

The point is that the exercise of the federal inherent power in these cases, as in this one, in an effort to control the litigation does not foster the forum shopping and

inequitable administration of the laws *Erie* was designed to prevent. *Erie* guarantees a litigant that if he takes his state law cause of action to federal court, and abides by the rules of that court, the result in his case will be the same as if he had brought it in state court. It does not allow him to waste the court's time and resources with cantankerous conduct, even in the unlikely event a state court would allow him to do so.

### III

Chambers contends there was insufficient evidence to support the district court's conclusion that he litigated in bad faith. We disagree. He was the central figure in the creation of the trust, the sham transfer of the station's assets to it, and the almost immediate leaseback. While some of this conduct arguably occured before the lower court acquired jurisdiction, it continued thereafter. In arguing the baseless recusal motion, Gray indicated he had filed it at Chambers's insistence. Chambers's petition to the F.C.C. to build a new transmission tower was in direct violation of the district court's order.

There was also evidence to support the district court's conclusion that Chambers was heavily involved in the fraudulent leases and false testimony presented at the hearing on the motion for judicial assistance. The corporation that allegedly owned the disputed equipment had no employees and had never engaged in production activities. The leases were rather obviously backdated—for instance, Chambers's wife signed one of them in her married name, but it was dated before their marriage.

Even making the dubious assumption that Chambers had nothing to do with the other litigation tactics the attorneys undertook, this evidence sufficiently supports a finding of bad faith. The district court did not err.



Finally, Chambers contends the amount of the sanctions was an abuse of discretion. We disagree. NASCO's expenses throughout this litigation were without exception the product of Chambers's bad faith tactics. The award reflects the amount of these expenses.

### IV

Gray, McCabe, and Curry argue that the disbarment proceedings violated due process. They say they did not have adequate notice that the court was considering disbarment; they assert that they participated in the sanctions hearing under the impression that they were defending only against monetary sanctions and did not know until the minute entry of December 12 that they also faced disbarment. Gray and Curry contend they were not given adequate notice of the conduct for which they faced disbarment. Finally, Gray argues that April 11 hearing was inadequate for disbarment purposes because it was limited to one day and it was prosecuted by NASCO's attorneys.

#### A

The appellants rely primarilly on *In Re Ruffalo,* 390 U.S. 544 (1969), to support their claim that the notice of their potential disbarment in the minute entry was inadequate. Ruffalo had been disbarred by the Supreme Court of Ohio on two charges relating to his alleged solicitation of clients for FELA cases. One charge had originally been presented to the state Board of Commissioners on Grievances and Discipline; the board added the other during the hearing, after Ruffalo had presented his defense. The Sixth Circuit then disbarred him based solely on the charge the board added during the hearing. The Court held

the Sixth Circuit erred because Ruffalo had not been given adequate notice of this charge or an opportunity to defend it. 390 U.S. at 550-551.

Here, Gray, McCabe, and Curry were informed of the charges for which they were subject to sanctions when NASCO filed its motion for sanctions on December 28, 1987. They presented their defenses to the charges at the hearing on monetary sanctions on April 11, 1988. They were later informed that the court was considering disbarment for the same offenses and were allowed to file briefs on that question.

We hold the appellants were afforded due process. They had adequate notice of the charges and were allowed to present a defense to each one of them at the hearing. The only question they were not allowed to argue at the hearing was whether their conduct subjected them to disbarment. The district court remedied that by allowing them to file briefs devoted to the issue after the minute entry. We see no defect in these proceedings.

B

Gray and Curry claim that NASCO's motion did not adequately inform them of the charges, but merely made vague and general allegations of misconduct over the course of the litigation by all of its opponents. We disagree. NASCO's motion contained four pages of allegations of specific instances of misconduct. Gray or Curry or both were alleged to be responsible for many of the acts listed.

C

Finally, Gray's argument that the hearing was inadequate also fails. First, we see no indication that he was in



any way prejudiced because the hearing lasted only one day. Since the misconduct alleged occurred in the court, there was no need for elaborate proof of the facts, and the parties offered none. Gray was given an opportunity to call any witnesses he wished and to take the stand himself. He chose not to. Second, we are not persuaded that NASCO's "prosecution" of the sanctions proceeding violated the strictures of *Young v. United States*, 481 U.S. 787, 107 S.Ct. 2124 (1987). There the Court held the appointment of the opposing counsel in the underlying litigation to prosecute a criminal contempt proceeding violated due process. The Court reasoned that counsel could not adequately represent the interests of the government and the interests of his private client at the same time. 107 S.Ct. at 2135-2139. Gray argues that because we have characterized a disbarment proceeding as quasi-criminal, *In Re Thalheim*, 853 F.2d 383, 388 (5th Cir. 1988), the reasoning in *Young* should apply.

We are unable to find any authority to support Gray's contentions and he points us to none. Further, we conclude that the danger present in *Young*, that private counsel would be overzealous in the contempt proceedings in an effort to further the interest of his client, was not present here. The arguments of counsel at the hearing were devoted entirely to the issue of monetary sanctions. The court later relied on its own research, aided by any briefs the parties wished to file, in determining the propriety of nonmonetary sanctions. 124 F.R.D. at 137, n.10. The court thus avoided placing NASCO's counsel in the role of prosecutor for the disbarment proceedings.

V

Gray, McCabe, and Curry next argue that the evidence was insufficient to support their disbarment. The

district court could have disbarred them only on the strength of clear and convincing evidence that they committed a disbarment offense. *In Re Thalheim, supra*, 853 F.2d at 389, n.9. We hold there was sufficient evidence to disbar.

There is no dispute that the appellants did everything the district court said they did. The district court found that they did it in bad faith, for the purpose of delaying an inevitable judgment against their clients. We have examined the record, and have concluded that clear and convincing evidence supported that finding. All three men repeatedly urged the frivolous public records doctrine defense. McCabe displayed disregard for the authority of the court by removing the disputed equipment from service at the station. McCabe also introduced fraudulent leases and testimony, characterized by the district court as "perjury." Gray and Curry made baseless arguments for recusal of the district judge. Gray noticed numerous needless depositions. Every act they undertook was to further the fraud on NASCO and on the court begun by the sham transfer to the trust. Their protestations that they acted in a good faith effort to defend their clients are not sufficient to overturn their disbarment in the face of this evidence.

## VI

Finally, McCabe argues the district court abused its discretion by disbarring him for five years. He cites *Thalheim* to support his contention that his conduct did not render him morally unfit to practice law, and he should not have been disbarred, or at least not for that long.

We note that the district court, in denying all motions for new trial on the sanctions issue, stated "McCabe's sanction was affected by the fact that he is a non-resident of the State of Louisiana, is not a member of the bar of this court; and by the probability that he rarely appears before this court." R.3762. We are concerned that the district court may not have anticipated that the Massachusetts Bar would similarly discipline McCabe. Therefore, without expressing an opinion on the propriety of a five year period of disbarment on the facts of this case, we remand to allow the district court to further consider the length of McCabe's disbarment in light of any action, or contemplated action, by the Massachusetts Bar.

AFFIRMED AND REMANDED.

## APPENDIX C

### IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Filed May 4, 1990

No. 89-4137

NASCO, INC.,

Plaintiff-Appellee,

versus

CALCASIEU TELEVISION & RADIO, INC., and G. RUSSELL CHAMBERS,

Defendants-Appellants.

and

RICHARD A. CURRY, EDWIN A. McCABE, and A.J. GRAY, III,

Appellants.

Appeals from the United States District Court for the Western District of Louisiana

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion February 6, 1990, 5th Cir., 1990 ____F.2d____)

(May 4, 1990)

Before WISDOM, JOHNSON, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:



The petitions for rehearing en banc are denied, no active member of the court having requested a poll. The petitions for panel rehearing are denied except upon further consideration of Richard A. Curry's petition for panel rehearing, we remand the case, as to Curry only, to the district court for reconsideration.

Curry vehemently denies that his conduct subjected him to suspension under the court's inherent powers; he protests that he did little more than sign pleadings. He insists that he did not receive an adequate opportunity to defend himself. We are persuaded that we should remand the case as to Curry only. On remand the district court will allow Curry to offer any relevant argument and evidence he may have. The district court may then reinstate, supplement or change its present findings and any ordered sanctions as it finds appropriate. We do not hold that the imposed sanction was an inappropriate response to the district court's perception of Curry's role. Curry seeks a further opportunity to dispel that perception. We do no more than allow him to do so, perhaps out of an excess of caution.

(3)

FILED

SEP 4 1990

JOSEPH F. SPANIOL, JR.
CLERK

NO. 90-256

# In the Supreme Court of the United States

OCTOBER TERM, 1990

G. RUSSELL CHAMBERS,

Petitioner

Versus

NASCO, INC.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## RESPONDENT'S BRIEF IN OPPOSITION


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## QUESTIONS PRESENTED FOR REVIEW

1. Given that a United States District Court possesses the inherent power to sanction parties for egregious misconduct in the course of litigation that is obstructive of justice, is the arsenal of available sanctions restricted by state law when the court sits in diversity?

2. Is the sanction imposed in this case appropriate in light of the egregious misconduct giving rise to the sanction?

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## TABLE OF AUTHORITIES

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TABLE OF AUTHORITIES (continued)

## RULE 29.1 STATEMENT

The following entities are subsidiaries of the respondent, NASCO, Inc.:

1. NASCO Holdings, Inc., a Tennessee corporation;

2. NASCO Real Estate, Inc., a Tennessee corporation;

3. Chalk-Line, Inc., an Alabama corporation;

4. NASCO Data Systems, a Tennessee corporation;

5. Johnson/Rudolph Training Development, Inc., a Kentucky corporation;

6. Channel Communications of Lake Charles, Inc., a Louisiana corporation;

7. Venture Mark, Inc., a Tennessee corporation;

8. BAYLY Corporation, a Delaware corporation;

9. NASCO Advanced Solutions, a Tennessee corporation;

10. Source One Corporation, a Tennessee corporation;

11. NASCO Northcreek, Inc., a Tennessee corporation;



12. NASCO Otterwood, Inc., a Tennessee corporation;

13. Northfield Lodge, Inc., a Tennessee corporation;

14. Channel Communications, Inc., a Tennessee corporation.

## COUNTERSTATEMENT OF THE CASE

From the affirmance of a judgment imposing sanctions, the defendant-petitioner, G. Russell Chambers, seeks a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. This brief is respectfully submitted on behalf of the plaintiff-respondent, NASCO, Inc., in opposition to that petition.

### A. *The Nature of the Case*

The challenged sanction was imposed in response to a motion filed by the plaintiff, NASCO, Inc. (NASCO). The respondents were G. Russell Chambers (Chambers), Mabel Christine Baker (Baker), and their counsel, A.J. Gray III (Gray), Edwin A. McCabe (McCabe), Richard A. Curry (Curry), and Gary L. Boland (Boland).

The motion arose out of an action in diversity for the specific enforcement of a Purchase Agreement providing for the sale of television station KPLC-TV in Lake Charles, Louisiana. NASCO was the purchaser. The defendants in the underlying action were Calcasieu Television and Radio, Inc. (CTR), the owner and defaulting seller; Chambers, the sole shareholder and sole director of CTR, who caused CTR to breach the Agreement; and Baker, Chambers' sister and trustee of the Facility Trust, an entity created by Chambers to receive simulated ownership of certain station properties in an attempt to avoid the entry of a TRO preserving the *status quo* and to prevent the judicial enforcement of the sale.

### B. *The Factual Context*

Chambers does not so much misstate, as ignore, the factual context from which the challenged sanction arises.

A telling omission. For the nature of this case cannot be understood without an appreciation of the scope and malignancy of the misconduct to which the district and appellate courts below responded in imposing sanctions. That context is set forth in the district court's Findings of Fact, *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 124 F.R.D. 120, 123-37 (W.D. La. 1989), Petitioner's App., 4-38. Those Findings were affirmed by the Fifth Circuit on appeal. NASCO hereby adopts those findings as its Counterstatement of the factual context of this case.

C. *The Proceedings Below*

NASCO's sanctions motion was filed on December 29, 1987, following the settlement of its claim for equitable adjustments for the delays incurred as the result of Chambers' breach. An evidentiary hearing was held on April 11, 1988. All parties were given the opportunity to brief the legal and factual issues raised, and to submit documentary evidence, affidavits, and testimony. All parties availed themselves of that opportunity to the extent they deemed appropriate.

On January 23, 1989, the district court granted NASCO's motion. *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 124 F.R.D. 120 (W.D. La. 1989), Petitioner's App., 1-58. Chambers was ordered to pay NASCO the sum of $66,286.85 in appellate sanctions[1] and $996,644.65 in sanctions for the manner in which the defense of the action was conducted. For the same pattern

[1] The trial court's fixing of the amount of the appellate sanctions awarded by the Fifth Circuit was not appealed by Chambers, and is, therefore, not at issue on this petition.



of abusive conduct, his lawyers were disbarred or suspended.[2] Baker was reprimanded.

On Chambers' appeal, the Fifth Circuit affirmed, holding that the district court possessed the inherent power to sanction a party for such misconduct, and that the sanction imposed was appropriate in light of the egregious misconduct which had occurred. *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 894 F.2d 696 (5th Cir. 1990), Petitioner's App., 59.

Chambers now seeks certiorari in an attempt to overturn that decision.

## SUMMARY OF ARGUMENT

The instant petition for certiorari should be denied. The decision of the lower appellate court is correct.

As an essential element of their very existence, federal district courts have the inherent power to regulate and control the conduct of litigants and lawyers appearing before them and, concomitantly, the power to levy appropriate sanctions against both for abuses of the judicial process. Those sanctions may include the assessment of the attorneys' fees and expenses incurred by the aggrieved party in combating the abusive tactics. That inherent power exists regardless of the source of jurisdiction or the substantive rule of decision in a particular case.

[2] Gray was disbarred from the Western District, and was prohibited from applying for readmission for a period of three years. McCabe was severely reprimanded and declared ineligible to practice in the Western District for a period of five years. Curry was suspended from practice in the Western District for a period of six months. Boland was not sanctioned.

The severity of the sanction imposed pursuant to a court's inherent power should be tailored to the gravity of the misconduct it seeks to redress. Where misconduct constitutes a systematic program of abuse embodying a fraud upon the court, it is appropriate and fitting that the entire cost of the proceedings be assessed as sanctions. In that context, the guidelines set forth in such cases as *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), simply have no application.

## REASONS FOR DENYING THE WRIT

This case presents no "special and important reasons" warranting review on writ of certiorari. Sup. Ct. R. 10.1. It is nothing more and nothing less than a case of unparalleled misconduct reaping an apt reward.

The defense mounted in this action was initiated by a deliberate act of fraud upon the court—a fraud designed to create the *appearance* that the subject properties had been sold to a third party, when in fact no sale had taken place and all ownership and control remained vested exclusively in Chambers. The immediate objective was to deceive the district court into believing it was powerless to preserve the *status quo*. The ultimate objective was to deceive that court into believing it was powerless to grant specific performance. That initial fraud literally *manufactured* the frivolous Public Records Doctrine argument ultimately relied upon by Chambers as his sole defense to NASCO's suit.

Following the initial fraud, Chambers and his counsel pursued a defense strategy designed to delay the inevitable transfer of the station for as long as possible, and to make the prosecution of this action as financially punishing to NASCO as human ingenuity could make it. The single,



overriding objective of that strategy was to render the vindication of NASCO's rights too costly to pursue.

That fraud, and the defense strategy that followed, was a calculated and deliberate assault upon the jurisdiction of the district court. It was for that extended, systematic program of abusive tactics that NASCO sought sanctions. It was for that program of systematic abuse that sanctions were awarded.

### A. *Inherent Power*

The challenged sanction was imposed under the aegis of the district court's inherent power.[3]

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[3] In seeking sanctions, NASCO invoked the provisions of 28 U.S.C. § 1927 and Fed. R. Civ. P. 11, as well as the district court's inherent power.

But those statutory provisions are highly particularized and narrow in their reach.

Rule 11 was promulgated for the purpose of checking abuses in the signing of papers filed in the course of litigation. Violation of the Rule mandates the imposition of appropriate sanctions against the signing and/or represented party. In terms, however, it does not apply to *any* misconduct by *any* individual that does not involve the signing of a specific paper in violation of the Rule's certification requirements—no matter how egregious, no matter how fraudulent, that misconduct might be.

The misconduct addressed by § 1927 is much broader. It applies to the unreasonable multiplication of proceedings. But the targeted malefactors are much more limited—only attorneys, *not* parties, may be sanctioned. Thus, § 1927 on its face cannot apply to *any* misconduct by *any* individual who is not an attorney—no matter how egregious, no matter how fraudulent, that misconduct might be.

Neither Rule 11, nor § 1927, nor both combined, would seem to provide a basis for assessing sanctions against Chambers for his role in the

Contrary to Chambers' assertions, the appellate court below did not chart "a bold new course for the federal judiciary," and did not depart from well established precedent.

That federal district courts have inherent powers—powers vested in them upon their creation, and by virtue of their function—is recognized in the jurisprudence of this Court dating back to the early 19th Century. *See, e.g., United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34, 3 L. Ed. 259, 260 (1812).

Such inherent powers must, as a matter of strict functional necessity, encompass the power to regulate and control the conduct of parties and their counsel:

> Federal courts have both the inherent power and the constitutional obligation to protect their jurisdiction from conduct which impairs their ability to carry out Article III functions. If such power did not exist, or if its exercise were somehow dependent upon the actions of another branch of government or upon the entitlement of a private party to injunctive relief, the independence and constitutional role of Article III courts would be endangered.

*In re Martin-Trigona*, 737 F.2d 1254, 1261 (2d Cir. 1984), *cited with approval in In re McDonald*, 489 U.S. ____, ____

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Footnote 3 continued.
confection and perpetration of the fraudulent sale and leaseback scheme—even though that scheme constituted a deliberate fraud upon the court—because he is not a lawyer, and because that malefaction did not involve the signing of papers filed in conjunction with this litigation.

The inherent power of a federal district court is not so restricted.



n.8, 109 S. Ct. ____, ____ n.8, 103 L. Ed. 2d 158, 165 n.8 (1989). Implicit in the power to regulate and control conduct is the concomitant power to levy appropriate sanctions for abusive litigation tactics. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765-67, 100 S. Ct. 2455, ____, 65 L. Ed. 2d 488, 500-01 (1980); *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 870 n.3, 875 (5th Cir. 1988) (*en banc*). *See Batson v. Neal Spelce Associates, Inc.*, 805 F.2d 546, 550 (5th Cir. 1986); *Huddleston v. Hermann & MacLean*, 640 F.2d 534, 559-60 (5th Cir. 1981). *See also Link v. Wabash R. Co.*, 370 U.S. 626, 630-31, 82 S. Ct. 1386, ____, 8 L. Ed. 2d 734, 738 (1962); *Miranda v. Southern Pacific Transportation Co.*, 710 F.2d 516, 520-21 (9th Cir. 1983); *McCandless v. Great Atlantic & Pacific Tea Co., Inc.*, 697 F.2d 198, 200 (7th Cir. 1983). Indeed, the use of inherent judicial power to impose monetary sanctions has been recognized as particularly appropriate when parties have practiced a fraud upon the court:

> No doubt, if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the entire costs of the proceedings could justly be assessed against the guilty parties. Such is precisely a situation where "for dominating reasons of justice" a court may assess counsel fees as part of the taxable costs.

*Universal Oil Products Co. v. Root Ref'g Co.*, 328 U.S. 575, 580, 66 S. Ct. 1176, ____, 90 L. Ed. 1447, 1452 (1946). *See Eppes v. Snowden*, 656 F. Supp. 1267, 1277-79, 1281-82 (E.D. Ky. 1986). *See also, e.g., Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 245, 64 S. Ct. 997, ____, 88 L. Ed. 1250, 1255 (1944); *Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972); *United Business Communications v. Racal-Milgo, Inc.*, 591 F. Supp. 1172, 1187 (D. Kan. 1984).

Thus, the inherent *power* is there. It does not derive from the contempt power. *Cammer v. United States*, 350 U. S. 399, 408 n.7, 76 S. Ct. 456, 460 n.7, 100 L. Ed. 474, 479 n.7 (1956); *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 565-66 (3d Cir. 1985). And it is part and parcel of the district court's inherent power to fashion appropriate sanctions in the face of abusive litigation practices. *See, e.g., Kendrick v. Zanides*, 609 F. Supp. 1162, 1173 (N.D. Cal. 1985) (*per* Schwarzer, J.) (invoking Rule 11, § 1927, and inherent judicial power to impose sanctions including compensatory fees and costs).

B. ***Erie*** *and the Inherent Judicial Power*

Chambers does not argue that the district court below lacks the inherent power to regulate the conduct of litigants before it. He does not argue that the district court lacks the inherent power to levy sanctions against litigants in response to abusive litigation tactics that are obstructive of justice. He does not argue that the district court lacks the inherent power to sanction *him*. Indeed, he does not even argue that the district court lacks the inherent power to impose a sanction that includes an award of the attorneys' fees reasonably incurred in responding to his misconduct. He argues only that, under the *Erie* Doctrine, such a sanction cannot include *all* of NASCO's attorneys' fees because Louisiana law does not permit awards of attorneys' fees absent express contractual or statutory provisions therefor.

Chambers' argument misses the point.

He presents his case in an absolute contextual vacuum, thereby attempting to sterilize it of the malignant conduct which tainted the proceedings below and provoked the sanction he now bemoans. That sterile atmosphere



invites his mischaracterization of this matter as a "fee-shifting" case in which a diversity court must look to state law for authority to award attorneys' fees to successful litigants.

But this is not a fee-shifting case. It is a *sanctions* case. Doubtless, the remedies available for breach of contract are, and should be, governed by the law of Louisiana. But the sanction at issue on this petition was not a remedy for breach of contract. It was not an element of relief on the underlying cause of action. It was a *sanction*. A sanction levied in response to systematic abuses of process running the gamut from delay to outright fraud, abuses designed to manipulate and to obstruct the very machineries of justice, abuses constituting a direct frontal assault on the district court's power to adjudicate.

No less than the contempt power, the inherent power to regulate the conduct of parties before the court arises from the nature of the court, as *court*, and is necessary to the exercise of all other powers. It is a matter of strict functional necessity. *See Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 562 (3d Cir. 1985). Such power is essential to the administration of justice, and is absolutely essential to the functioning of the judiciary itself. *Id.* at 563. Without it, no federal district court can fulfill its "constitutional obligation to protect [its] jurisdiction from conduct which impairs [its] ability to carry out Article III functions." *In re Martin-Trigona, supra*, 737 F.2d at 1261.

The exercise of such inherent power, regardless of the type of sanction imposed, does not, and cannot, implicate the *Erie* Doctrine. If the district court below is imbued with the inherent power to impose *some* sanction upon Chambers for his malignant conduct, then Chambers' argument is merely that *Erie* forecloses, not *all*, but only

*this particular,* sanction. A dubious proposition at best.

The *Erie* rule seeks to discourage forum shopping and to prevent the inequitable administration of laws.

The exercise of inherent power by the district court below to vindicate the sanctity of its proceedings and its very power to adjudicate does not foster the forum shopping *Erie* was designed to prevent. As a practical matter, litigants do not shop forums on the basis of what arsenal of sanctions is available to punish miscreant litigants and lawyers, any more than they file suit in federal court (or remove to federal court) in order to obtain the benefits of Rule 11 or § 1927.

Nor does the exercise of such inherent power foster the inequitable administration of laws. At bottom, *Erie* promises a diversity litigant that if he prosecutes or defends a state law claim in federal court, and abides by the rules of that court, the result in his case will be the same as if it had been brought in state court. It does not promise him that he may lay waste to the orderly processes of justice, even in the unlikely event that a state court would permit him to do so.

On a more fundamental policy level, the federal interest—rising to the level of a constitutional obligation—in defending federal judicial proceedings against conduct designed to systematically eviscerate a federal court's very power to adjudicate is manifest. The State of Louisiana has no conceivable interest whatsover in regulating or limiting the panoply of sanctions available to a federal district court in its efforts to fulfill that constitutional obligation.[4] Why,

[4] *Alyeska Pipeline Service Co. v. Wilderness Society,* 421 U.S. 240, 95 S. Ct. 1612, 44 L. Ed. 2d 141 (1975), is not to the contrary.



indeed, should the ability of a district judge to fashion an appropriate sanction for egregious misconduct in *federal* court be made to vary depending upon what state he sits in, or what state's law happens to govern the underlying substantive claim? Why should a *federal* court's power to redress abuses of *federal* process be made in any way subservient to Louisiana policies concerning the availability of substantive remedies for breach of contract? Why should state policy be permitted to strip a federal diversity court of sanctions it could wield in another type of case? Those questions answer themselves. Federal courts do not sit as eunuchs, impotent to protect themselves from abusive conduct, merely because they sit in diversity.

The sanction imposed on Chambers below was based solely and squarely on his egregious and relentless misconduct in the district court proceedings. The district court did not shift fees. It *sanctioned.* That sanction was not a matter of remedy. It was a matter of vindicating judicial authority and the sanctity of the judicial process itself.

Footnote 4 continued.

*Alyeska* was a fee-shifting case in which the prevailing parties sought to recover their attorneys' fees on a "private attorney general" theory. It was not a sanctions case, and did not involve the imposition of sanctions for systematic abuses of process, assaults upon the jurisdiction of the court, or misconduct embodying a fraud upon the court. The *Alyeska* dictum relied upon by Chambers simply observes that, in an ordinary diversity case, where there are no countervailing federal policies or considerations, fee-shifting requests should be governed by state law. *Id.*, 421 U.S. at 259 n.31, 95 S. Ct. at ____ n.31, 44 L. Ed 2d at 154 n.31. That dictum in no way implies that the arsenal of sanctions available to a federal district court for the vindication of its authority should expand and contract depending on the basis of its jurisdiction.

At bottom, the instant case, which *does* involve the imposition of sanctions for egregious misconduct, is *not* an ordinary diversity case, does *not* involve fee-shifting, and *does* implicate federal policies and considerations of the highest gravity.

*Erie* does not require a federal district court to tolerate abuses in diversity cases that it would not tolerate in other cases. *Erie* does not restrict the range of appropriate sanctions available to vindicate the authority of a federal district court merely because the underlying claim sounds in diversity.

As the court in *Republic of Cape Verde v. A & A Partners,* 89 F.R.D. 14 (S.D.N.Y. 1980), noted:

> Since it is the federal judicial process that has been abused a federal court should be able to deal with the abuse as it sees fit regardless of the power of the courts of the state where it sits.

*Id.* at 20 n.12 (diversity case applying New York law). *See also Sterling Energy, Ltd. v. Friendly Nat'l Bank,* 744 F.2d 1433, 1435 n.2 (10th Cir. 1984); *Montgomery Ward & Co. v. Pacific Indem. Co.,* 557 F.2d 51, 61 (3d Cir. 1977) (Gibbons, J., concurring); *Tedeschi v. Smith Barney, Harris, Upham and Co., Inc.,* 579 F. Supp. 657, 660-61 (S.D.N.Y.), *aff'd* 757 F.2d 465 (2d Cir. 1985).

Simply put, it is not the business of the State of Louisiana to police the conduct of parties in federal courtrooms. And Chambers cites no authority from this Court to suggest otherwise.

C. *The Sanction*

Chambers next challenges the sanction itself on several fronts, characterizing it as an abuse of the district court's inherent power.[5]

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[5] In essence, these arguments assert mere error in the imposition of the sanction and its affirmance by the lower appellate court. Such is not the



1. *Timeliness.*

He first contends that it was untimely. By only *warning* him repeatedly that his conduct was offensive, he argues, the district court lulled him into believing he had not yet sunk to a sanctionable level. To *deter* him, he says, that court should have sanctioned him earlier.

In retrospect, it is impossible to disagree with the suggestion that Chambers should have been sanctioned earlier. But there is nothing whatsover in the record or the history of these proceedings to suggest it would have done any good.[6]

To the extent Chambers argues that the trial court erred in deferring the sanctions proceeding to the end of the litigation, he is clearly wrong. *See, e.g., Cooter & Gell v. Hartmarx Corp.,* No. 89-275, slip op. at 9 (U.S. June 11, 1990).

Be that as it may, the timeliness issue Chambers urges derives from *Thomas v. Capital Security Services, Inc.,* 836 F.2d 866 (5th Cir. 1988) (*en banc*), in which the

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Footnote 5 continued.
stuff of certiorari:

> The jurisdiction [to bring up cases by certiorari] was not conferred upon this court merely to give the defeated party in the circuit court of appeals another hearing.

*Magnum Import Co. v. Coty,* 262 U.S. 159, 163, 43 S. Ct. 531, ____, 67 L. Ed. 922, 924 (1954).

[6] Indeed, Chambers to this day characterizes the findings of the district court as "a scurrilous attack" with "absolutely no basis in fact." Petition For Writ of Certiorari, p.18 n.4. *Scurrilous*? That unrepentant adjective hardly suggests he is deterred even yet.

court concluded that, because Rule 11 permits an award of reasonable attorneys' fees, a party seeking such a sanction has the duty to mitigate his damages by correlating his response to the merits of the offending paper, and by timely notifying the court and the offending party of the alleged Rule 11 violation. *Id.* at 879, 884. Thus, the timeliness requirement is one of timely *notice*—notice of the alleged violation—*not* the filing of a sanctions motion, not the commencement of a sanctions proceeding, not the imposition of sanctions.

And Chambers had plenty of notice, as he readily admits.[7]

Moreover (and contrary to Chambers' representations to this Court) the district court's work was not com-

[7] He had notice on October 24, 1983—seven days after this suit was filed—when NASCO filed its Amended Complaint, characterizing the bogus sale and leaseback scheme as a deliberate fraud upon the court. He had notice in December 1983, when NASCO sought contempt sanctions against him. He had notice in March 1984, when the district court imposed contempt sanctions, referencing his manifest bad faith. *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 583 F. Supp. 115, 120-21, 122 (W.D. La. 1984). He had notice when the district court expressly questioned the defendants' good faith in the status conference of December 17, 1984. He had notice when the district court denied his recusal motion in January 1985, characterizing his supporting affidavit as rank hearsay, rumor, and gossip interlaced with innuendo, and again recited the bad faith conduct of the defense. He had notice in April 1985, when the district court disseminated draft copies of Judge Schwarzer's article on Rule 11 sanctions, with a direct warning to counsel. He had notice when NASCO informed the court and counsel that it was requesting the court to retain jurisdiction following the rendition of judgment for the express purpose, *inter alia*, of enabling that court to determine the issue of attorneys' fees pursuant to Rule 11.

The list goes on.

Chambers was warned repeatedly. In chilling terms. In terms calculated to hit home, and to hit home hard. He simply refused to be deterred.



pleted when it finished the specific performance trial in 1985. There remained the inevitable appeals and their attendant requests for stays to the trial court, the Fifth Circuit, and the Circuit Justice. There remained two additional contempt motions pertaining to Chambers' shenanigans at the FCC. There remained NASCO's motion for judicial assistance in closing the sale—provoked by Chambers' recalcitrance in conveying the properties NASCO had contracted to purchase—which required an evidentiary hearing more elaborate than the merits trial itself. There remained the closing of the sale, an arduous task requiring the supervision of the district court. And there remained the disposition of NASCO's claim for equitable adjustments for delay. Given the delays encountered in disposing of what should have been a simple lawsuit, the district court was understandably focused on the disposition of these substantive matters. It had little time for collateral issues. Recognizing that, the court in a series of status conferences with counsel determined that the sanctions issue would await the completion of the substantive claims.

All in all, the deferral of the sanctions issue was calculated to exert the maximum pressure possible on Chambers to curb his offensive tactics during the remainder of the action. But Chambers was undeterrable. The instant sanction is but the fruit of that recalcitrance.

There is no issue as to the timeliness of the challenged sanction.

2. *Tailoring.*

Chambers would suggest that the sanction was not tailored to his wrongful conduct.

On the contrary, it is a perfect fit.

The quantum of the sanction levied against Chambers is substantial. But it is totally in line with the gravity of his misconduct.

His first act in response to this litigation was the perpetration of a deliberate and calculated fraud upon the district court. His every act thereafter was in aid of that initial fraud, and was designed to maintain its plausibility and to preserve the Public Records Doctrine defense that fraud created. The initial fraud indelibly taints the entirety of the proceedings below, rendering the defense on its face a sanctionable malefaction by litigants and lawyers alike.

Beyond that, the defense mounted by Chambers embodies a deliberate strategy of delay, harassment, and oppression. It was conceived in fraud and conducted thereafter in absolute bad faith. It was nothing less than a systematic and relentless assault upon the judiciary itself.

The sanction levied against Chambers comprises nothing more and nothing less than the expenses necessarily incurred as a direct and proximate result of Chambers' misconduct. *NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 124 F.R.D. 120, 133 (W.D. La. 1989), Petitioner's App., 28.

Every penny of the substantial fees and expenses incurred by NASCO was spent, and spent *necessarily,* in dismantling the edifice of fraud erected at Chambers' behest. But for the fraudulent sale and leaseback scheme, NASCO's claim for specific performance would have been amenable to summary disposition. Instead, NASCO faced the most effective war of attrition that money could buy.



Chambers pursued his tactics of delay with great tenacity and vigor. According to Gray's evidentiary submissions in the sanctions proceedings, Chambers had a host of lawyers (in addition to Gray, Boland, and McCabe)—one in Atlanta, three in Washington, and six in Lake Charles—all advising him on his strategies at various points in the course of the litigation. Pleading after pleading, raising issue after issue, rained down on NASCO's head. Those issues were not urged halfheartedly. They were pressed with all the skill and tenacity that Chambers' stable of lawyers could bring to bear. And in the context of this $18 million lawsuit, NASCO had no choice but to take those volleys seriously, and to respond in earnest.

The scope, malignancy, and systematic character of Chambers' misconduct fully warrants an award of *all* attorneys' fees, costs, and expenses incurred by NASCO in the proceedings below. That sanction is nothing more than the cost directly generated by Chambers' fraudulent schemes. It is nothing more than what was necessary in order for NASCO to endure, and to prevail. Indeed, it is nothing more than the injury Chambers willingly sought to inflict on NASCO. Chambers' malefaction was total. It is only fitting that NASCO's recompense be total.

Thus, the sanction *is* tailored. And the fit is perfect. As this Court has noted, when "the very temple of justice has been defiled" by a fraud upon the court, "the entire cost of the proceedings could justly be assessed against the guilty parties." *Universal Oil Products Co. v. Root Ref'g Co.,* 328 U.S. 575, 580, 66 S. Ct. 1176, ____, 90 L. Ed. 1447, 1452 (1946). *See also, Unioil, Inc. v. E.F. Hutton Co., Inc.,* 809 F.2d 548, 557 (9th Cir. 1986); *Batson v. Neal Spelce Associates, Inc.,* 805 F.2d 546, 551 (5th Cir. 1986); *Eppes v. Snowden,* 656 F. Supp. 1267, 1281-82 (E.D. Ky. 1982); *Kendrick v. Zanides,* 609 F. Supp. 1162, 1170, 1172-73

(N.D. Cal. 1985) (*per* Schwarzer, J.).

Chambers would suggest that the sanction imposed in this case could not have been tailored because the proof submitted by NASCO at the evidentiary hearing was insufficient and could not be tested by the district court to ascertain whether it was related to Chambers' misconduct.[8]

NASCO submitted memoranda, affidavits, and itemized billing statements setting forth the fees and expenses incurred in conjunction with this litigation. NASCO's evidentiary submissions established that the

[8] Chambers suggests that the sanction should have been tested in accordance with the 12 factors set out in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), and this Court's opinion in *Hensley v. Eckerhart*, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983).

Those factors have no meaningful application in a sanctions case such as this one. Both *Johnson* and *Hensley* addressed attorneys' fees awards to prevailing plaintiffs in civil rights cases. The purpose of such awards is to assure that civil rights plaintiffs are able "to obtain competent counsel worthy of a contest with the caliber of counsel available to their opposition." *Johnson v. Georgia Highway Express, Inc.*, *supra*, 488 F.2d at 719-20. Obviously, that policy has little to do with the impetus behind the sanction awarded in this case.

In situations such as this one, where a litigant has tampered deliberately and relentlessly with the very machineries of justice, the court's response must necessarily focus on the vindication of the integrity of the system, on the deterrence of such misconduct in the future by similarly motivated litigants, as well as on the alleviation of the offense to private parties. Those *desiderata* necessarily imply a shift of the "reasonableness" focus away from an audit of the offended party's costs, and toward the gravity of the misconduct and the extent of the resources of the offender. *See, e.g.*, *Thomas v. Capital Security Services, Inc.*, 836 F.2d 866, 881 (5th Cir. 1988) (*en banc*). As Chambers himself has put it—a tailoring of the sanction to the gravity of the offense.



litigation costs awarded were billed and paid on an interim basis over the course of this litigation. Those submissions reflected the actual hours and actual funds expended in the prosecution of this claim. The hourly billing rates charged by counsel for NASCO were counsel's standard billing rates, and were entirely compatible with the rates charged by similar practitioners for similar work in their communities.

NASCO's evidentiary submissions were fully sufficient to establish, with particularity, the fees and expenses incurred, the services performed, and the hours consumed in the performance of those services. The detail provided was sufficient to permit the district court to determine the reasonableness of those fees and expenses, and the extent to which they should be included in any sanction awarded.

And that is precisely what the district court did. The district court found no fault with NASCO's evidence. The district court found no lack of detail. The district court found, as a matter of fact, that the sanction was reasonable in light of the gravity of the offense. And the district court was affirmed by the appellate court below. This Court does not sit to review on writ of certiorari the factual findings of lower federal courts. *General Talking Pictures Corp. v. Western Electric Co., Inc.*, 304 U.S. 175, 178, ___ S. Ct. ___, ___, 82 L. Ed. 1273, 1275 (1938).

3. *Mitigation.*

Chambers next suggests that NASCO failed to mitigate its expenses. A defense so frivolous as to warrant a *per curiam* affirmance from the bench at oral argument and the immediate imposition of sanctions, he argues, should not have required extensive efforts in the district court and should have been amenabale to summary judgment.

That suggestion is simply disingenuous.

NASCO did not guilefully lie in wait, acquiescing in misconduct in order to build a claim for sanctions against an unsuspecting Chambers. To the contrary, NASCO's every effort was to expedite these proceedings, to cut through the tangled superfluity of collateral issues raised by Chambers, to get—finally—to the throat of the initial fraud and bring this matter to an end.

As a practical matter, the malignant purpose and lack of legal or factual foundation of pleadings cannot relieve an opponent of the necessity of responding seriously. Silence in the face of such abusive filings may invite disaster. It is incumbent upon the opponent of such pleadings to *demonstrate* their baselessness and malignancy to the tribunal that will ultimately rule upon them. And unless malignancy and baselessness are combined with total ineptitude, that can rarely be done without serious research and preparation. And Chambers and his counsel were not inept—at least not in that regard. Time and again, their filings raised issues of apparent merit, only to disintegrate when the cited authorities were examined. Throughout the course of this litigation, Chambers routinely placed the burden of that illumination on NASCO.

Chambers' suggestion that NASCO's failure to move for summary judgment demonstrates its failure to mitigate contains more rhetoric than reason.

The fact of the matter is that the fraudulent sale and leaseback scheme foreclosed any such summary disposition on the merits. But NASCO did move immediately to undo it. NASCO petitioned the district court on October 24, 1983—just days after the confection of that fraud—for a mandatory preliminary injunction *compelling* Mabel



Baker to "reconvey" the subject properties to CTR in order to restore the *status quo*. The district court chose a more conservative course—to issue a prohibitory preliminary injunction to preserve the altered *status quo* pending consideration of the merits of Chambers' Public Records Doctrine defense. That choice reflects the underlying factual question upon which NASCO's claim for specific performance would ultimately turn. Specific performance could be granted only if the bogus sale to Baker could be rescinded. That sale could be rescinded only if it was not real. And the reality, *vel non*, of that sale was purely and simply an issue of fact that would ultimately turn on the credibility of the parties to that transaction.

NASCO did not fail to mitigate its damages. It did what it had to do, and *only* what it had to do, in order to prevail.

4. *Unconnected misconduct.*

Finally, Chambers suggests that the challenged sanction includes amounts attributable to misconduct unconnected with the proceedings at the district court.

In truth, that unconnected misconduct was not unconnected at all. It was part and parcel of Chambers' strategy of delay. The fees attributable to the proceedings before the FCC were fees incurred by NASCO in combating actions taken by Chambers in direct violation of the injunctive orders of the district court. The fees incurred in conjunction with the mandamus petition to the Fifth Circuit on the recusal motion (rejected as meritless by that court) were incurred in combating the most cynical and unseemly of attempts at manipulating the processes of justice. The fees incurred in responding to the writs and motions to stay the district court's judgment in the Fifth Circuit, and

before the Circuit Justice, were not included in the sanction imposed by the district court.

The fact of the matter is that the defense of this litigation was conceived in fraud and was conducted thereafter in absolute bad faith. All that happened was the direct and proximate result of that initial fraud. All of the fees incurred, and ultimately awarded, flowed directly from that fraud.

In the end, the district court was faced with the task of fashioning a sanction appropriate to the gravity of Chambers' misconduct. A sanction significant enough to deter Chambers, and to deter other powerful and wealthy litigants who might be tempted to bludgeon opponents into submission by converting a lawsuit into an extended act of systematic economic brutality.

The sanction fashioned by the district court, and affirmed by the appellate court below, was necessary and entirely appropriate to that task.

## CONCLUSION

This case does not warrant review on writ of certiorari.

As a litigant in federal court, Chambers was duty bound to litigate in good faith, to deal honestly with the court, to yield to the orderly processes of justice. He breached those duties, choosing instead to embrace deception, fraud, and outright falsehood as the tools of litigation. The judicial system can neither tolerate nor long survive conduct so deviant from acceptable standards.

Chambers' misconduct, unparalleled in reported



federal decisions, brought down upon him a heavy sanction, indeed. A sanction calculated to impress him and to deter him from future abuses. A sanction designed to deter other litigants of similar wealth, arrogance, and determination who might be tempted to utilize similar tactics of deception, fraud, and falsehood. A sanction that was both fitting and appropriate.

The district court's inherent power to impose such sanctions in vindication of its authority does not implicate the *Erie* Doctrine. State policies governing the availability of substantive remedies cannot be permitted to impair a federal district court's ability to protect itself.

The court's constitutional obligation to preserve the integrity and sanctity of the judicial process is best fulfilled by visiting appropriate wages upon those who would labor to abuse it. The instant sanction does just that.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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By: ______________________
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## CERTIFICATE OF SERVICE

I, David L. Hoskins, a member of the Bar of this Court, hereby certify that, as counsel for the plaintiff-respondent, I received a copy of the Petition For Writ of Certiorari on August 6, 1990, and that three copies of the Respondent's Brief in Opposition to Petition For Writ of Certiorari were mailed, first class postage prepaid, to Mr. Mack E. Barham and Mr. Russell T. Tritico, counsel for the petitioner. I further certify that all parties required to be served have been served.

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# NO. 90-256

## In the Supreme Court of the United States

OCTOBER TERM, 1990

G. RUSSELL CHAMBERS
Petitioner,

v.

NASCO, INC.
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

**JOINT APPENDIX**
**VOLUME I**

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PETITION FOR CERTIORARI FILED AUGUST 2, 1990
CERTIORARI GRANTED OCTOBER 1, 1990

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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| | | by ced.) 2636 |
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| 1-23-90 | 511 | OPINION on a Motion to Fix Compensatory Damages Pursuant to Contempt Judgment, to Fix Appellate Sanctions, and to Impose Sanctions filed by NASCO. (NSS/om) NOE 1-25-90 3420 |
| 1-23-89 | 512 | JUDGMENT in favor of NASCO, Inc. and against respondent, G. Russell Chambers, in the full sum of $66,286.65 representing the amount of the sanctions imposed by order of the U.S. Court of Appeal for the Fifth Circuit, with interest. Further ordered that judgment be rendered in favor of NASCO, Inc. and against G. Russell Chambers in the full sum of $966,644, as sanctions, representting the total attorney's fees and expenses incurred and paid by NASCO, Inc. in this matter, with interest. Further ordered that A. J. Gray III be stricken from the roll of attorneys authorized to practice in the WDofLA. (sic) and that he be prohibited for a period of three years from making application for readmission. (CONT'D) 3478 |
| 1-23-89 | 512 | JUDGMENT CONTINUED: Further ordered that Richard A. Curry be suspended from practice in the WDofLA. (sic) for a period of six months. Further (sic) ordered that Edwin A. McCabe of the Massachusetts Bar is severely reprimanded and declared ineligible to practice in the WDof LA. (sic) for a period of five years. Further ordered that the Clerk of Court shall send a certified copy of this Opinion and Judgment to (1) the Office of Bar Counsel, Daniel Kluback, Board of Bar Overseers of the Supreme Judicial Court, 11 Beacon Street, Boston, Massachusetts 02108, and (2) the Supreme Court of Louisiana, 109 Supreme Court Building, 301 Loyola Avenue , New Orleans, LA 70112-1887. (NSS) DKT-D 1-25-89 (om) NCE per instructions. |
| 2-21-89 | 547 | NOTICE OF APPEAL (D's. Calcasieu TV & Radio & G. Russell Chambers) to the 5th Circuit Ct. of Appeals from the judgment entered on 1-23-89 assessing sanctions against them; APPEAL FEES PAID; NOE 2/22/89 to Ct. Appeals; Barham, Tritico; Harwell/Ross; Scofield/Hoskins; Rider; Smith; Golden; McCabe/Garvey/Gray; Boland; Torian; Keller; Canaday: Crow: Judge Scott; M. Leleux (nl) 3675 |



RELEVANT DOCKET ENTRIES FROM THE UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

| | |
|---|---|
| 2-6-90 | AFFIRMED and REMANDED (13 pages) |
| 5-4-90 | File and order denying petitions (3) for Rehearing En Banc. File and order denying petitions for Rehearing except as to Curry—REMANDED. |

NASCO, INC.

v.

CALCASIEU TELEVISION AND RADIO, INC.:
G. Russell Chambers and
Mabel Christine Baker.

Civ. A. No. 83-2564.

United States District Court,
W.D. Louisiana,
Lake Charles Division.

Nov. 8, 1985.

## OPINION

NAUMAN S. SCOTT, District Judge.

This is an action for specific performance of a Buy and Sell Agreement (Agreement) executed on August 9, 1983, providing for the sale and purchase of television station KPLC-TV in Lake Charles, Louisiana.

Jurisdiction is found under the provisions of 28 U.S.C. § 1332.

The plaintiff is Nasco, Inc. (Nasco), the prospective purchaser of the station. The defendants are Calcasieu Television and Radio, Inc. (CTR), the owner and prospective seller of the station; G. Russell Chambers (Chambers), the sole shareholder and sole director of CTR, who signed the Agreement on behalf of CTR and in his individual capacity; and Mable Christine Baker (Baker), in her



capacity as the Trustee of a Facility Trust which is the alleged record owner of certain immovable properties previously owned by CTR and covered by the Agreement. Chambers is Baker's brother, and is the settlor of the Trust of which Baker is Trustee. His three adult children are the beneficiaries.

This matter was tried to the Court without a jury as a suit in equity on April 17, 1985. Prior to trial, Nasco dismissed without prejudice certain claims in contract and in tort, reducing its case in chief to a purely equitable claim for specific performance of the August 9th Agreement and the defenses applicable thereto. By order of the Court, trial was limited solely to those claims, severing all other issues (including damages) for trial at a later date.

Chambers and CTR contend that the remedy of specific performance is no longer available to Nasco because the title of Baker is protected by the Louisiana Public Records doctrine thereby reducing Nasco's remedies to a claim for damages.

## FINDINGS OF FACT

1. On August 9, 1983, Nasco, as buyer, and CTR and Chambers, as sellers, entered into the Agreement to convey the television facilities and the broadcast license of KPLC-TV in Lake Charles, Louisiana for the purchase price of $18 million dollars. The Agreement has never been recorded in Calcasieu and Jefferson Davis Parishes where the properties are located.

2. It is expressly recognized in the Agreement that the Agreement could not be consummated unless and until Federal Communication Commission (FCC) approved the transfer of the KPLC license to Nasco.

Paragraph 6 of the Agreement provides as follows:

> "It is specifically understood and agreed that the consummation of this Agreement shall be in all respects subject to the approval of the Commission (Federal Communications Commission-FCC).Upon execution of the Agreement, *Buyer and Seller shall proceed as expeditiously as practicable to file all requisite applications* and other necessary instruments, and agree thereafter to prosecute said application or applications with all reasonable diligence and otherwise to cooperate with each other and to use their best efforts to obtain the requisite consent and approval promptly and to carry out the provisions of this Agreement. *In no event shall the Application be filed later than forty five (45) days from the date of the Agreement.*" (Emphasis ours).

Thus the joint application for transfer of the license was to be filed no later than September 23, 1983.

3. On August 22, 1983 Brian Burns and Jim Smith who had signed the Agreement on behalf of Nasco visited KPLC-TV. This was the only instance on which any representative of Nasco was present at the TV station prior to September 23, 1983. It was during this visit that Rita Guillory, president of CTR, learned for the first time that KPLC-TV was to be sold, and that Chambers had signed the Nasco Agreement of August 9, 1983. The president of CTR had no part in the negotiations leading to the execution of the Agreement; nor was she consulted regarding the Agreement. In fact no officers or employees of the station except Chambers and his lawyers were aware that the Agreement existed.

Up to the time that he left a meeting with Nasco representative on August 22, 1983, Chambers and CTR had been cooperative in carrying out the Agreement.



4. On August 28, 1983 Chambers' application for a 3½ million dollar bond issue was rescinded or refused. Although the bond issue had no relationship to the performance of the Agreement, Chambers continuously referred to this failed bond issue as a basis for delaying the submission of CTR's portion of the FCC application to transfer the license.

5. Chambers called Bill Cook, chairman of Nasco, on August 29, 1983 and tried to talk him out of going through with the Agreement, offered to reimburse all of Nasco's expenses and pay some additional money. Cook's reply was, "My only interest is in acquiring KPLC-TV." Chambers had demonstrated as early as August 29, 1983 that he desired to avoid performance of the Agreement.

6. On September 2, 1983, Nasco informed CTR and Chambers that Nasco's portion of the Assignment Application was ready and in suitable form for filing with the FCC.

7. On or about September 7, 1983 Chambers had a telephone conversation with Brian Burns in which he referred to the failed bond issue and then asked "What would you say if I didn't file?" Burns replied that Nasco had been ready to file its portion of the FCC application since September 1 or 2 and that he would be very disappointed.

8. Burns and Chambers spoke again on Monday, September 12, 1983. When Chambers asked what Burns thought of Chambers' remark on September 7th, Burns replied that, based on his brief contacts with Chambers, he thought that Chambers would do what the agreement provided. Chambers answered that he recognized that he

(CTR) had a contractual obligation to file CTR's portion of the FCC application.

9. On the next day they spoke again. Chambers, referring again to the lack of any progress in resolving the bond problem, stated that he recognized his obligation but that, if he didn't have an answer to the bond problem by September 23, 1983, he would not file. The bond problem was still entirely unrelated to the Agreement.

10. In a letter (Ex. P2) dated September 16, 1983, Nasco (Brian Burns) refers to the content of the conversations (Paragraph 6-9 above) in detail, and again notified CTR and Chambers that the assignee's part of the application had been ready and in suitable form for filing since September 2nd and requested that CTR "immediately prepare, have executed and forwarded the assignor's portion of the assignment application prior to September 23, 1983."

Chambers replied on September 21, 1983 (Ex. P3) that the Agreement speaks for itself and that he understood that his "attorney has contacted your attorney." He did not deny any of the content of the September 16, 1983 letter (Ex. P2).

11. On September 23, 1983, Nasco's FCC counsel, John Stewart, was informed by defendants' FCC counsel, Roy Russo, that the assignor's portion of the Application would not be filed on that date. On that same date Stewart caused a letter to be hand delivered to Russo, stating again that Nasco was ready and willing to file the assignee's portion of the Application and that Russo should notify him if and when the assignors portion was received.

12. From August 9, 1983, the date that the Agreement was executed by the parties, until September 23, 1983, the date by which CTR was to submit its portion of the FCC application, there was no default or violation of the Agreement on the part of Nasco. In fact all parties, including Chambers, were performing and ready to go forward on August 22, 1983. On that date Burns and Smith, representing Nasco, visited the TV station by arrangement with Chambers. Both Chambers, sole member of the Board of CTR, and Rita Guillory, its president who later married Chambers, were present. Chambers, along with the Nasco representatives chose which of several TV announcements should be used to publicize the intended sale. Although Chambers refused to honor Nasco's request for a list of community leaders to be interviewed by Nasco to prepare its portion of the FCC application, no one contested his right or his reasons for doing so.



13. Chambers, for reasons best known to himself, decided at some time between August 22, 1983 and August 29, 1983 that he did not want to go through with the Agreement. When he called Bill Cook on the latter date (see paragraph 5 above) they talked some forty-five minutes. Chambers did not complain of the violation of any pre-August 9, 1983 understanding, any violation of the Agreement, any harassment of station operations or personnel, any difficulty with ascertainment interviews—all of which have been alleged by defendants following the institution of this suit. He simply tried to generate with Cook some terms on which he could buy out of the Agreement. Cook was adamant.

14. In Chambers' conversations and correspondence with Burns after August 29, 1983 he never once alluded to any such breaches by Nasco, he talked only of an unrelated bond problem as the reason for his admitted reluctance to file CTR's portion of the FCC application. Although he

admitted that he and CTR were bound by the Agreement (now a stipulated fact), Chambers suggested on September 7, 1983 for the first time that he (CTR) might refuse to file timely his portion of the FCC application (paragraphs 7-10 above). His (CTR's) acts after August 29, 1983 finally culminated in his (CTR's) unjustified and arbitrary refusal to file CTR's portion of the FCC application by September 23, 1983. This refusal was a deliberate violation of their obligations under paragraphs 6 and 31 of the Agreement. Their refusal or failure to file was in absolute bad faith.

15. On Friday, October 14, 1983, counsel for Nasco notified Jonathan Golden, and attorney for Chambers and CTR and an officer of CTR, that it would file suit in the United States District Court for the Western District of Louisiana in Alexandria, Louisiana on Monday, October 17, 1983, seeking appropriate relief for breach of contract and that counsel for Nasco would appear in Alexandria at approximately noon on that date to request injunctive relief to preserve the status quo by enjoining the alienation or encumbrance of the subject properties until a judicial resolution of the dispute could be obtained. This information was transmitted to Chambers through his Lake Charles attorneys.

This notice was given to the defendants Chambers and CTR pursuant to the requirements of Fed.R.Civ.P. Rule 65(b) and Rule 11 of the Local Rules of this Court which are designed to give notice to a defendant in an application for a temporary restraining order so that he may be present at the hearing and defend his interest. Chambers and his attorneys took advantage of this notice to send into motion a scheme which they have freely admitted was designed to place certain CTR properties beyond the reach and jurisdiction of this court through the medium of the Louisiana Public Records Doctrine and deprive Nasco of a



judicial determination of its rights to specific performance and still maintain CTR in possession and in a position to continue its operations without interruption.

16. Taking advantage of this notice, Chambers arranged a meeting with his Lake Charles attorneys at some time between two and six p.m. on Sunday, October 16, 1983. The attorneys prepared and Chambers executed an act of donation in trust with a corpus of $1,000.00; appointing Chambers' sister, Baker, as Trustee and naming Chambers' three adult children as beneficiaries. Both Chambers and Rita Guillory (now Mrs. Chambers) were fully aware on October 16, 1983 that the two tracts of land on which the TV station and the transmitter were located were to be sold to Nasco under the agreement of August 9th. Yet, contemporaneously with the drafting of the Trust, Chambers, the sole member of the Board of Directors and the sole stockholder of CTR, directed Rita Guillory, the President of CTR, to execute Warranty Deeds coveying the two tracts to Baker, Trustee, for a recited consideration of $1.4 million dollars represented by an unexecuted note in that amount. The president of CTR complied, as directed.

17. On the evening of Sunday, October 16, 1983, Chambers phoned his sister, Baker, and informed her of the creation of the Trust and that it was his wish that she act as Trustsee. He did not refer to the duplicate deeds which had been executed by Rita Guillory on behalf of CTR. After she consented to be Trustee, Chambers told Baker, that he would be coming to Birmingham, Alabama the next day to have her sign some documents.

18. The deeds were recorded at 8:30 a.m. on Monday, October 17, 1983; with none of the consideration having been paid, with the note still unsigned, and with CTR still in undisturbed possession despite the recordation of the

credit sale deeds. All this was accomplished at the sole direction of Chambers.

19. Late on the morning of Monday, October 17, 1983, Nasco's counsel appeared before us in Alexandria and filed its complaint against CTR and Chambers seeking as part of the relief against those parties specific performance of the Agreement and a Temporary Restraining Order (TRO) to enjoin those parties from alienating or encumbering the properties covered by the Agreement. Mr. Gray, one of the Lake Charles counsel for CTR and Chambers, had requested by a telephone call to the Clerk of Court's office that morning that he be informed when Nasco's counsel arrived. We personally called Mr. Gray, informed him that Nasco's counsel had stated to us that notice had been given of the injunctive relief sought by Nasco and that they could not account for Mr. Gray's absence. Mr. Gray did not plead surprise or lack of notice. Had he done so, we, considering the substance of the relief sought, would have delayed action until Mr. Gray could be present. This was not considered, however, because Mr. Gray stated that he did not intend to be present and that he was making no statements or representations on behalf of his client. However, he did participate fully in the conference. We informed him of the nature of the injunctive relief sought, read to him verbatim, the Order suggested by Nasco and solicited comment from him. After further discussion with Mr. Gray and counsel for Nasco, alterations in the Order were agreed upon and the Order, incorporating these alterations, was signed by us at 1:34 p.m. A hearing for a preliminary injunction was set for October 24, 1983. Mr. Gray participated in the TRO conference by telephone as fully as he could have done if personally present, and was fully aware of the fact that the TRO was signed by us on or about 1:34 p.m. Although Mr. Gray, during this discussion, was then deeply involved in Chambers' scheme



to place the property beyond the reach and jurisdiction of this Court, he made no mention of this to the Court. Exhibit P. 1].

20. At or about 4:30 on the afternoon of Monday, October 17, 1983, after the deeds had been recorded, and after the order had been signed in Alexandria, Chambers flew to Birmingham, Alabama and met Baker at the airport. He directed her to sign the trust agreement and the $1.4 million note to CTR. She did as directed. She does not recall being told about the sale or receiving a copy of it. She signed the note without knowledge of why she was signing, what it was for, or how she was going to pay it. The corpus of the trust at that time was $1,000. Baker was given no explanation and she did not ask for any.

21. On Tuesday, October 18, 1983, the Lake Charles counsel for CTR and Chambers admitted by letter that they had recorded the duplicate deeds at 8:30 a.m. on Monday 6, October 17, 1983 and that they intentionally concealed that fact from the Court prior to and during the issuance of the TRO.

22. On Monday, October 24, 1983, we granted a preliminary injunction against CTR and Chambers, and entered a second temporary restraining order directed against Baker to prevent her from selling, transferring, or in anyway encumbering the CTR properties. Mr. Gray appeared as counsel for CTR and Chambers but denied representation of Baker. Nasco's counsel, having assumed Mr. Gray would represent her, then made attempts to contact Baker prior to the Court's issuance of the order. Failing such notice, the Court, in the interest of justice, granted such TRO against Baker, as trustee of the Facility Trust at 10:37 a.m. on October 24, 1983.

23. Chambers caused his Lake Charles attorneys to prepare a leaseback agreement from Baker, trustee, to CTR covering the same properties allegedly conveyed to Baker in the duplicate deeds of October 16, 1983. Rita Guillory signed this instrument on behalf of CTR on October 22, 1983 and forwarded it to Baker, directing her to sign and return. Baker had no notice or other reason to expect the receipt of this lease. Baker knew nothing of its terms or contents and she had no part in any negotiations. No explanation accompanied the lease; Baker had no conversation or advice with Rita Guillory, Chambers or anyone else. She simply signed and returned the lease on October 25, 1983. It is not shown in the record, even at this late date, that Baker was aware of the October 16, 1983 "sale" from CTR or the identity of the property covered by that "sale."

24. We find as a matter of fact that CTR, from a date prior to August 9, 1983 was in complete control of Chambers; that the Fidelity Trust, from the time of its inception on Sunday, October 16, 1983 and the Trustee Baker from the time of her acceptance on or about 5:15 p.m. on Monday, October 17, 1983 also were controlled completely by Chambers. This finding is based on the evidence as a whole and particularly on the following uncontroverted facts:

a. The Agreement was consummated and executed on August 9, 1983. Chambers was the sole and only participant and negotiator on behalf of CTR and himself. No other officer or employee of CTR, with the exception of Jonathan Golden, Chambers' attorney in these negotiations who was also a CTR assistant secretary, was aware that a sale of CTR properties was contemplated or that an agreement to sell had been consummated.

b. Chambers, and Chambers alone, determined at



some time prior to September 23, 1983 that CTR would not file its portion of the FCC application and that CTR has continued this refusal.

c. Chambers, and Chambers alone, determined that the CTR station and transmission properties should be sold. No corporate advantage or benefit to CTR has been disclosed or demonstrated in the sale-leaseback arrangement. Not only did he direct CTR to make the sale, he created a purchaser, the Trust, controlled entirely by him through Baker, to whom the properties were sold. He furnished the consideration to be used by the Trustee to pay for the properties in the form of rental under a lease which enabled him to maintain actual possession in CTR.

d. The duplicate acts of sale were drafted at the direction of Chambers. He specified which CTR properties were to be sold. He alone determined the amount of consideration to be paid.

e. The Trust was created by Chambers' Lake Charles attorneys at Chambers' direction. He determined the terms and conditions of the Trust, the beneficiaries, the corpus, the identity and powers of the Trustee. All of this had been done and Chambers had executed the Trust instrument prior to Chambers' telephone call to Baker at about 8:00 p.m. on Sunday, October 16, 1983 in which he sought and received her consent to become Trustee of the Trust.

f. The deed to Baker was signed by Rita Guillory on behalf of CTR between 2:00 p.m. and 6:00 p.m. on Sunday, October 16, 1983 as directed by Chambers. The president, Rita Guillory, signed the duplicate deeds simply because she had been directed by resolution of the sole director, Chambers, to do so. Neither she nor Chambers could have negotiated the sale with Baker as trustee because the Trust

did not exist and Baker had no knowledge that a trust was contemplated. Only Chambers knew.

g. When Rita Guillory signed the duplicate deeds conveying title to CTR's station and transmission sites for 1.4 million dollars, she actually received no consideration. She received no cash, no note and there was no Trustee purchaser who could sign such a note, and no money in the trust to pay the note. Nor was there a mortgage or other security to assure payment of the purchase price. CTR's attorneys, knowing all this, had the duplicate deeds recorded at 8:30 a.m. the next day. At the time these deeds were recorded the Trust had total assets of one thousand dollars. At some time after 5:15 p.m. on Monday, October 17, 1983 when the Trustee finally signed the 1.4 million dollar promissory note, the Trust assets still consisted of 1,000 dollars. Actually the monthly rental installments of $14,000 will be insufficient to pay any of the last 120 installments of the note, each of which amounts to $17,735. All of this was known by CTR, by Chambers and by their Lake Charles attorneys and none of it was a matter of concern to any of them. The reason was control. Chambers had absolute control of the Trustee Baker and of CTR.

h. When Baker accepted the trustee-ship, the deed from CTR to her, as Trustee, already had been executed by Rita Guillory on behalf of CTR. In order to accomplish Chambers' scheme, the deed was recorded without Trustee Baker's signature and at 8:30 a.m. Monday, October 17, 1983, prior to any possible consideration of Nasco's application for a TRO. At the time of recordation Baker had not yet become Trustee nor had she signed the note. She did not know that the duplicate deeds existed. Baker did not know the identity, the location, the accessibility or the extent of the properties; was not familiar with the buildings, improvements or equipment located on the properties; had no knowledge of the titles or value of the properties; had no knowledge of why it was bought or what she was to do with it; had not initiated or been approached regarding the sale; had no part in choosing the property, no part in negotiationg the sale, in setting the price or the method of payment. With no concern regarding her means of payment or the value of the property described in the deeds, she signed a note in favor of CTR for 1.4 million dollars and delivered it, as instructed, to Chambers. Chambers had not mentioned the sale or the note in his telephone conference with her on Sunday night. He gave her no such information or explanation on Monday, October 17, 1983 in Birmingham and she requested none. According to her testimony she signed simply because her brother would not have directed her to do so if he was not going to arrange a means of payment.



i. Chambers caused the Trust to be drawn assigning to Trustee Baker unlimited power to sell:

. . . . . .

5.1 *Powers.* The Trustee shall possess the following powers with respect to each trust.

. . . . . .

> F. *Sale or Other Disposition.* The Trustee may sell, exchange, redeem, mortgage, pledge, lease (as lessor), or otherwise dispose of any productive or unproductive property of the trust estate, at public sale, private sale or otherwise; for cash or other consideration; payable at the time of the disposition or on credit. The lessee may abandon trust property that the Trustee determines does not warrant protection.

. . . . . .

Thus Chambers, thru Baker, can revest title of the properties in CTR at such terms and on such considerations as he may choose.

j. The lease provides that CTR shall pay all utility bills and other similar charges, and ad valorem, sales and other taxes and assessments (Para. 3). CTR assumes responsibility for all "basic structural defects in the immovables, to include the foundations, walls, roof, windows and doors . . . and all other repairs, not withstanding the provisions of the Louisiana Civil Code to the contrary." (Para. 4). CTR agrees "to defend, indemnify and save Lessor harmless from all claims" for personal injury or property damage occurring on the premises during the term of the lease (Para. 7). CTR is bound to provide and maintain at its expense Fire and Extended Coverage Insurance and Owners', Landlords' and Tenants' Liability Insurance with such coverage and in such amounts as CTR deems appropriate so long as the amounts equal or exceed minimums specified in the lease (Para 8). Baker does reserve the right to approve the location and design of any exterior sign or the addition by lessee of any improvements to the property. (Para. 14). This reservation is mere window dressing to a lessor who was completely ignorant of the exterior or improvements when the lease was executed and has never visited the premises since. The evidence establishes that it was never intended that Baker would exercise any rights reserved by Chambers to her under the leaseback agreement and that she never has and never will unless directed to do so by Chambers.

The lease is a month to month lease terminable by either party on notice given the other 10 days before the lapse of any month. It can be terminated also at lessor's option upon CTRs failure to perform certain obligations of the lease.



It is quite obvious that Baker is ignorant of the terms of the lease because, in complete violation of her fiduciary responsibilities, she paid from Trust funds in her special account the 1984 ad valorem taxes in the amounts of $6,488.90 to Wayne F. McElween, Sheriff & Tax Collector (of Calcasieu Parish); $2,664.35 to City of Lake Charles and $6,272.04 to Dallas Cormier, Sheriff and Ex Officio Tax Collector (Jefferson Davis Parish). CTR was obligated under the provisions of the lease (Para. 3) to pay this $15,429.29 and Baker has never protested CTR's failure to do so or demanded reimbursement from CTR. She is personally liable to the beneficiaries for the payment of this $15,429.29 from Trust funds.

k. Baker, in all her acts, was under the complete control of Chambers. She performed without question or inquiry every act which he instructed her to perform. In fact every discretionary act performed by her as Trustee, except routine ministerial acts like paying bills, was programmed by Chambers. All she had to do was sign. Several remarks in her testimony are especially enlightening:

"Q: So you don't remember when you first saw the deeds?

"A: No, sir, I don't right now.

"Q: The one million four hundred thousand dollars, you had nothing to do with fixing that price of course?

"A: No, sir.

"Q: And if Mr. Chambers had put on that deed two million dollars or ten million dollars, that would have been okay with you?

"A: I would have accepted it. I would have assumed that he knew what he was doing.

"Q: So you Mabel Christine Baker, had no input in fixing the price?

"A: No, sir.

"Q: And you had no input in determining what property would be included in the deed, did you, ma'am?

"A: No sir.

"Q: In other words, it could have been property in Alabama or property in Freeport, Texas?

"A: No, my brother wouldn't do that.

"Q: Well, no, as long as he owned it?

"A: Uh-huh, that's right.

"Q: But it didn't matter to you what the property was was my question; is that correct?

"A: If that property was to be for a trust fund for his children, then I was willing to accept.

"Q: Sure, But my question is, as long as Mr. Chambers decided that the property—whatever property he decided would go into the deed, that was all right with you?

"A' If it were legal. (Tr. pp. 41-42)

. . . . . .

"Q: I understand. But the point is, at the time of the signing of the trust and the note and the acceptance of the deeds or whatever, you didn't know how many acres were involved at that time?

"A: Well, I figured that my brother knew and that he—when he asked if I would do it and I accepted what he had to say about it. (Tr. p. 44)

. . . . . .

"Q: And when you signed the note for one million four hundred thousand dollars, you did not ask Mr. Chambers, Russ, how am I going to pay this note?

"A: No, sir, I didn't. Because I figure that he would not



have his sister or would not ask her to be a trustee of a trust without making some provisions to handle the situation." (Tr. p. 46)

. . . . . .

"Q: Who made the decision to lease that property to the television station?

"A: I would have no way of knowing unless it came from Mr. Chambers.

"Q: I see. In other words, Mr. Chambers—

"A: If he set up the trust, I would suppose he'd lease the property.

"Q: Now, Mr. Chambers or Mrs. Chambers or somebody representing them sent this lease to you and said, Mabel, please sign it?

"A: The lease was sent to me, there was a note that says sign, and that was no—and no explanation.

"Q: And who sent that note?

"A: That came from Ms. Guillory at that time.

"Q: And it simply said sign this?

"A: Right.

"Q: Did it say anything about sending it back?

"A: I read it—and returned. And I read it, had it notorized, and returned.

"Q: You didn't call Ms. Guillory to find out any more about it? It didn't concern you?

"A: Yes, it concerned me. But I didn't get any call for any any explanation. You know, sometimes you feel like that if you are put in a position of a trust, that you should try to handle things yourself whether you make mistakes or not. So I tried to handle this myself." (Tr. pp. 47-48)

We find that Baker has exhibited no discretion of her own, that she has shown no fiduciary responsibility in her acts as trustee. She will perform any act or acts directed by Chambers without question and without any consideration of why. She feels that the trust corpus is his property for his children and she should do exactly what he directs.

25. The duplicate deeds were modeled after the ordinary formulary forms[1] with several alterations or lack of alterations, which might be significant since the deeds were signed only by the vendor, CTR.

a. It was not an authentic act, but a private act duly acknowledged.

b. The usual title "CASH SALE" is changed to "WARRANTY DEED".

c. Although possession of the property was not delivered to the alleged purchaser at the time of execution of the deeds or at the time of recordation the word "DELIVER" was not deleted from context of "GRANT, BARGAIN, SELL, ASSIGN, CONVEY AND DELIVER".

d. The deed states: "This sale is made for and in consideration of the sum of ONE MILLION FOUR HUNDRED THOUSAND AND NO/100 ($1,400,000.00) DOLLARS'.

e. The recitation of consideration is always followed by the works "cash in hand paid, receipt of which is hereby acknowledged" or words of similar effect.

[1] A Basic Louisiana Notary Guide by James D. Johnson, Jr.; Louisiana Notarial Manual by M. Truman Woodward Jr; Louisiana Civil Practice Forms by Roger M. Denton.



f. Where, as here, a note was received, the consideration must be described as a note and the sale is then a credit sale.

g. We find, as a matter of fact, that these alterations in the duplicate deeds were made at the direction of Chambers deliberately and for the purpose of deceiving those members of the public relying on the public records that the property had been delivered to the purchaser and that the consideration had been paid in cash, when in fact there was no delivery or consideration.

26. Chambers and CTR had notice on Sunday, October 16, 1983 of Nasco's intent to file its complaint against Chambers and CTR seeking specific performance of the Agreement and a TRO to preserve the status quo. They knew that a hearing in Alexandria on the TRO application was set for the late morning or noon on Monday, October 17, 1983. This knowledge precipitated the implementation of a plan previously devised by Chambers, CTR and their Lake Charles counsel, to place the CTR properties on which the TV station and the transmission facilities are located beyond the reach and jurisdiction of the court and contemporaneously therewith to retain such properties in possession of CTR for its continued operations and control.

27. The sole and only reason for the creation of the trust on October 16, 1983 was the implementation of the plan to prevent specific performance of the Agreement and to continue CTR in possession of the property. If, as Chambers testified, he had previously mentioned such a trust to others, had sought legal advice, why had he not confected the trust before? What changed the situation now to make it more attractive to him on a Sunday, the eve of the TRO conference? He admitted that he had other

properties more appropriate to put in trust. Why did it have to be done so hastily? We find that under the circumstances here no trust would have been made and no property "transferred"' if Chambers (CTR) had not previously been informed that Nasco would file this suit the next day.

## CONCLUSIONS OF LAW

1. Notice, under the facts in this case, is not an issue. Mr. Gray, counsel for Chambers and CTR, participated in the Alexandria hearing by telephone and as fully as if he were present. He was informed in detail and was certainly aware of the relief sought; the profered temporary restraining order was read to him verbatim; the modifications suggested by him were considered and adopted. His participation on behalf of his clients waived any need for notice. The temporary restraining order issued by this court at 1:34 p.m. on October 17, 1983 was legal and valid.

2. We accept defendants' stipulation and find that the Agreement of August 9, 1983 was a valid and enforceable contract as of the date of trial.

3. By virtue of this stipulation, the defendants waived and withdrew all allegations of breaches of the Agreement on the part of Nasco which they previously asserted by way of counterclaims and affirmative defenses, and conceded all facts necessary to the resolution of Nasco's claim for specific performance, reserving for adjudication only the question of the effect of the recordation of the October 16, 1983 conveyance from CTR to Baker trustee.

4. We accept defendants' stipulation that the failure of Chambers and CTR to file CTR's portion of the FCC application on or before September 23, 1983 constituted a default of the Agreement by Chambers and CTR.



5. Nasco has performed its contractual obligations under the Agreement in good faith and to the fullest extent possible. It has at all times and presently is ready, willing and able to perform its obligations to the completion of the contract.

6. Specific performance:

a. Paragraph 16(a) of the Agreement provides in pertinent part:

> "In the event of the failure of Seller to Close the transactions contemplated herein, . . . Buyer . . . may terminate this Agreement and sue for money damages *or elect to continue this agreement and sue for specific performance and/or damages.*" (emphasis ours)

b. LSA-CC 1986 provides:

> "Upon an obligor's failure to perform an obligation to deliver a thing, or not to do an act, or to execute an instrument, the court *shall grant specific performance* plus damages for delay *if the obligee so demands.* If specific performance is impracticable, the court may allow damages to the obligee." (emphasis ours)

Specific performance is the mandatory remedy when demanded by the obligee. Nasco is entitled to such relief as a matter of right; it is not granted simply at the Court's discretion. *J. Weingarten, Inc. v. Northgate Mall, Inc.*, 404 So.2d 896, 900-01 (La.1981); *Bolin Farms v. American Cotten Shippers Ass'n,* 370 F.Supp. 1353, 1360-65 (W.D.La.1974).

This is an action to enforce specific performance of a contract to sell and transfer a TV license and facilities.

Federal courts have not hesitated to grant specific performance of such contracts. *Wooster Republican Printing Co. v. Channel Seventeen, Inc.* 682 F.2d 165 (8th Cir.1982) (*per curiam*), *aff'g Wooster Republican Printing Co. v. Channel 17, Inc.*, 533 F.Supp. 601 (W.D.Mo.1981); *Hawaiian Paradise Park Corp. v. Friendly Broadcasting Co*, 414 F.2d 750 (9th Cir.1969), *aff'g Friendly Broadcasting Co. v. Hawaiian Paradise Park Corp.*, 282 F.Supp. 464 (D.Hi.1967); *Field v. Golden Triangle Broadcasting, Inc.*, 451 Pa. 410, 305 A.2d 689 (1973); *Times-Journal, Inc. v. Jonquil Broadcasting Co.*, 226 Ga. 673, 177 S.E.2d 64 (1970).

We conclude under these principles that Nasco is entitled to the remedy of specific performance unless that remedy under the facts of this case is impracticable.[2]

7. This Court has full and inherent power to restore the status quo; *Porter v. Lee*, 328 U.S. 246, 96 S.Ct. 1096, 90 L.Ed. 1199 (1946); *Jones v. SEC*, 298 U.S. 2, 56 S.Ct. 654, 80 L.Ed. 1015 (1936); *Texas & New Orleans R.R. Co. v. Northside Belt Ry. Co.*, 276 U.S. 475, 48 S.Ct. 361, 72 L.Ed. 661 (1928); *FTC v. Weyerhauser Co.*, 648 F.2d 739 (D.C.Cir.1981). We have, therefore, the power to restore the status quo in effect at the time that Chambers and CTR became aware that a temporary restraining order would be sought by Nasco on Monday, October 17, 1983. We have found as a matter of fact that they had this knowledge on or before 2:00 p.m. on Sunday, October 16, 1983.

[2] The defense of impracticability as asserted by the defendants assumes that if the October 16 conveyance cannot be pierced, the Purchase Agreement cannot be specifically enforced.

That assumption is simply wrong.

It has long been recognized, in Louisiana and elsewhere, that where only part of a contract is susceptible of specific performance, a court of equity will specifically enforce that part. *In re Canal Bank & Trust Co.*, 221 La. 184, 59 So.2d 115, 119-20 (La.1952( (per curiam on application for rehearing); *Longino v. Webb Press Co.*, 60 So. 707, 711, 716 (La.1912); *Big State Barging Co. v. Calmes*, 138 F.Supp. 891, 892 & n. 3 (E.D.La.1956). *Cf.* La.Civ.Code art. 2455. Thus, it is clear that Louisiana recognizes and accepts the principle that partial specific performance, with a concomitant reduction in purchase price, may be granted.



8. Chambers has admitted repeatedly that the trust-sale-lease operation was a deliberate, planned scheme to place the CTR properties beyond the reach and jurisdiction of this Court while maintaining continued and uninterrupted possession of the properties in CTR. Neither the trust nor the duplicate deeds had been drafted prior to Sunday, October 16, 1983. However, on that date Chambers had full knowledge and notice of the scheduled appearance (noon Monday, October 17, 1983) before this Court to consider NASCO's application for a TRO. This notice was given as required by F.R.Civ.P. rule 65(b) and Local Rule 11 so that Chambers and CTR might have the opportunity to appear and oppose the application. These defendants have emasculated and frustrated the purposes of these rules and the powers of this Court by utilizing this notice to prevent NASCO's access to the remedy of specific performance.

It is also uncontroverted that Mr. Gray, because of his participation in the TRO appearance had full, complete and actual knowledge and notice, as the attorney for Chambers and CTR in this lawsuit, of the issuance of the TRO at about the time it was issued, i.e., 1:34 P.M., Monday, October 17, 1983. In addition, Mr. Scofield, a counsel for NASCO, personally served a copy of the TRO on Mr. Gray at 5:00 P.M. Monday afternoon. The only purpose for Chambers' trip to Birmingham was to complete and perfect the sale of the CTR properties by securing the signature of his sister, Baker, on the trust instrument and on the 1.4 million dollar note. In doing this he was acting on behalf of

CTR as well as himself. We hold that where, as in this case, the attorney participated in the TRO appearance on behalf of Chambers and CTR, those parties are bound by the acts of their lawyer agent and are considered to have notice of all facts, notice of which can be charged upon the attorney. F.R.Civ.P. 65(d); *Smith v. Ayer*, 101 U.S. (11 Otto) 320, 25 L.Ed. 955; *Link v. Wabash R. Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962), reh. den., 371 U.S. 873 S.Ct. 115, 9 L.Ed.2d 112; *Orgeron v. Mine Safety Appliances Co.*, 603 F.Supp. 364 (E.D.La. 1985). Since the presentation of these instruments to Baker for her signature was for the purpose of completing the transfer specifically prohibited by the TRO. Chambers' act of presentation, occurring as it did after his attorney's knowledge of the issuance of the TRO, was an absolute violation of that order.

On October 22, 1983 Rita Guillory, on behalf of CTR, lessee, executed a lease-back agreement and sent the agreement to Baker, the lessor, for her signature without any explanation whatsoever. The instrument covered the properties which had been conveyed by CTR to Baker on October 16, 1983 and provided for rental of $14,000 payable monthly in advance. This lease had two effects necessary to ratify and complete the alleged sale from CTR on October 16, 1983. it is an uncontroverted fact that delivery of possession of the properties to Baker was never made. This lease had the effect of giving Baker constructive possession of the properties as a lessor. It is also uncontroverted that the trust had no resources or income to pay the purchase price of 1.4 million dollars. This lease provided the only funds available to the trustee, Baker, for the payment of that consideration. Both of these effects are in aid of and necessary to the validity of the alleged sale of October 16, 1983. It is an uncontroverted fact that Chambers and CTR had personal knowledge and notice of issuance of the TRO prior to October 22, 1983. The execution of this lease by



CTR at the direction of Chambers is an act in aid of and necessary to the validity of the deed executed by CTR on October 16, 1983. As such, this act is specifically prohibited under the TRO and is in absolute violation of that order.

9. A simulated sale is an absolute nullity which conveys no title, and which may be set aside by the courts at any time, at the demand of any interested party. *Succession of Terral*, 312 So.2d 296, 299 (La.1975). The Public Records Doctrine cannot invest a simulation with substance and validity, and cannot protect it from rescission. *E.g.*, *Smith v. Smith*, 239 La. 688, 119 So.2d 827, 832 (1960).

Louisiana law establishes a rebuttable presumption that a transaction is a simulation, and thus without substance or legal effect, under either of two circumstances.

The first occurs when the seller retains property ostensibly sold. *Boagni v. Waterbury*, 403 So.2d 856, 859 (La.App. 3d Cir. 1981); *Ingram v. Freeman*, 326 So.2d 565, 566 (La.App. 3d Cir.), *writ denied*, 329 So.2d 755 (La.1976), La.Civ.Code art. 2480.

> *Presumption of simulation by retention of possession by seller.* In all cases where the thing sold remains in the possession of the seller, because he has reserved to himself the usufruct, or retains possession by a precarious title, there is reason to presume that the sale is simulated, and with respect to third persons, the parties must produce proof that they are acting in good faith, and establish the reality of the sale." La.Civ.Code art. 2480.

The second occurs when the party alleging the simulation

shows circumstances which cast doubt or suspicion on the reality of the transaction. The classic "suspicious circumstances" identified by the courts of Louisiana would include: (1) conveyance to a close friend or relative; (2) timing close to an impending lawsuit, or other circumstances suggesting a desire to place the property out of reach; (3) lack of, or doubtful consideration; (4) retention of possession by the seller; and (5) lack of inspection and knowledge of the property by the vendee. *See, e.g., Smith v. Smith, supra,* 119 So.2d 831-32; *Williams v. Smith,* 340 So.2d 401, 402-03 (La.App. 3d Cir. 1976); *Ingram v. Freeman, supra,* 326 So.2d at 576-78; *Beatty v. Beatty,* 186 So.2d 855, 859-61 (La.App. 1st Cir. 1966); *McDade v. Green,* 157 So. 275, 277-78 (La.App. 2d Cir. 1934). All five of the classic circumstances occur in the instant sale.

We have noted previously, Finding of Fact 28, that the specially drawn duplicate deeds recite that the properties were delivered by CTR to Baker when, as we have already noted, no delivery was made. More significant is the fact that the duplicate deeds are given the more innocuous title "warranty deed" rather than the more precise title "cash sale" or "sale and mortgage". Consequently this leaves it up to any third-party examining the record to determine what type of sale is represented and thus what law is applicable to it. This is a cash sale because the consideration is recited in *dollars.* Not a note, *dollars.* Finding of Fact 25. The words "cash in hand paid, *receipt of which is hereby acknowledged*" or words of similar import are necessary as a certification by the signing vendor that he had received the purchase price. In this case no cash purchase price was ever paid. The signature of the purchaser can be omitted only in those instances where the vendor has delivered physical possession of the property and the purchaser has actually taken possession. *Megason v. Boleyn Lumber Co.,* 140 La. 431, 73 So. 257 (La.1916); *Franks v. Scott,* 191 So. 175 (La.App. 1st Cir.1939). It is



well established here that no dollars (cash) were paid, that no possession was delivered. In the absence of delivery of possession to the purchaser, the purchaser's signature was necessary. That signature is absent. In fact there is no evidence the prospective trustee purchaser had assented to the sale at the time of recordation. The deeds are absolutely null, void and of no effect. Nor could they be ratified by the acts accomplished by Chambers and CTR after 1:34 p.m. October 17, 1985 as is shown elsewhere in this opinion.

For the above reasons we hold that the duplicate deeds executed by Rita Guillory on behalf of Calcasieu Television & Radio, Inc. on October 16, 1983-and recorded on October 17, 1983 in Conveyance Book 1771, p. 465, File No. 1774481 of the records of Calcasieu Parish, Louisiana and in Conveyance Book 561, p. 538, File No. 446829 of the records of Jefferson Davis Parish, Louisiana are null, void and of no effect.

10. *Third-party purchaser under the Public Records Doctrine.* under Louisiana law, there could be no valid sale without a purchaser who has knowledge of the transaction, who consents to the object sold and to the purchase price at the time of or prior to the execution of the instrument embodying the sale. La.Civ.C. art, 2456; *McDade v. Green,* 157 So. 275 (La.App. 2nd Cir. 1934); La.Civ.Code art. 2456; Baker cannot qualify as a third party purchaser as contemplated under the Public Records Doctrine. That doctrine does not give validity to an invalid sale, it merely protects a valid sale. At the time of recordation Baker had no knowledge of the value, extent or location of the properties described in the alleged deeds, did not know the purchase price and had not consented to the alleged sale. She had not been consulted, she had no part in the negotiations leading up to the sale. In fact, she had no knowledge that the sale had taken place.

Chambers' own testimony at trial conclusively establishes that the trust was created and that Baker was vested as trustee, for the sole express purpose of generating a Public Records Doctrine defense to the specific enforcement of the agreement of August 9, 1983. A purchase literally created by his seller for the sole purpose of defeating the contractual rights of another cannot be considered a third-party purchase for the purpose of raising the Public Records Doctrine as a shield.

It is well established under Louisiana law that party interposed by his vendor for the express purpose of raising the Public Records Doctrine as a shield cannot be considered a third-party purchaser for that reason. *Burns v. Jolley*, 153 La.212, 95 So.648 (La.1923). *See also First Nat'l Bank of Ruston v. Mercer*, 448 So.2d 1369 (La.App. 2nd Cir.1984).

11. *Impracticability*. Specific performance in this instance is not impracticable. As shown above, the sale instrument as recorded was null, void and of no effect. That the entire series of transactions was a meaningless paper exchange between Chambers, Chambers (CTR), and Chambers (Baker); it was a checker game in which Chambers made all the moves for CTR and all the moves for Baker. He himself has admitted that all of it was done for the sole purpose of defeating specific performance of the agreement entered into by him and CTR with Nasco on August 9, 1983. All the acts done subsequent to the recordation of the sale and which might have the effect of ratifying, confirming or curing the deficiencies in that sale were done after the TRO became effective against the persons engaged in those acts are, therefore, in violation of that order and are subject to cancellation along with the deeds recorded on October 17, 1983.



## CONCLUSIONS

We find that Nasco is entitled to be restored to the status quo existing prior to the recordation of October 17, 1983 and to specific performance of the Agreement of August 9, 1983, and to judgment ordering that defendants Chambers and CTR perform expeditiously and in good faith all the obligations assumed by them in said Agreement; ordering further that Chambers and CTR file, on or before ten (10) days after judgment of this Court CTR's portion of the application to the FCC for the transfer of the license and the cooperation in good faith in proceedings before the FCC to achieve the transfer of license; ordering further that CTR produce and cancel the 1.4 million dollar note and deposit the cancelled note in the record of this proceeding on or before ten (10) days after judgment of this Court; ordering further that the Clerks of Court of Calcasieu Parish and of Jefferson Davis Parish cancel and erase from the Conveyance Records of each parish the deed from CTR to Baker, Trustee, executed October 16, 1983 and the lease agreement executed by Baker, Trustee, on October 25, 1983 and by Rita Guillory on behalf of CTR on October 22, 1983; ordering further the performance of any and all other acts which may be necessary to restore the status quo prior to the recordation of October 17, 1983. Said order is to be binding on Chambers and CTR, their officers, agents, servants, employees and attorneys, and upon those persons in active concert of participation with them who receive actual notice of the order by personal service or otherwise.

Plaintiff should submit a form of judgment in conformity with the above on or before ten (10) days from date hereof.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA LAKE CHARLES DIVISION

Filed DEC 22 1985

NASCO, INC.

-vs- : CIVIL ACTION NO.83-2564

CALCASIEU TELEVISION & RADIO, ET AL

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**RULING ON MOTIONS FOR STAY**

All three defendants have filed Motions to Stay Execution of our Judgment of November 27, 1985 (242, 243, 244).[1] The motions, in principal part, are DENIED.

We see no reason to repeat here any of the findings and conclusions outlined in our Opinion of November 8, 1985 or the conclusions and authorities submitted by NASCO, Inc. (NASCO) in its well reasoned memorandum of authorities (245) which we adopt as our reasons for this Ruling with the following additional comment.

Not only have defendants failed to make a showing of the four essential elements necessary to entitle them to the issuance of a stay but there are compelling additional reasons for denying the stay.

(1) That defendants are likely to prevail on the merits of the appeal.

The record will reflect that this is a very simple case, that the Buy and Sell Agreement (Agreement) was executed by NASCO, G. Russell Chambers (Chambers), and Calcasieu Television and Radio, Inc. (CTR) on August 9, 1983; that, in addition to the sale of facilities and the FCC license to NASCO, it provided that the parties would cooperate and utilize their joint efforts to complete the sale as soon as possible; that time was of the essence; that a joint application to the FCC for the transfer of the license



would be filed no later than September 23, 1983. To further assure performance of the contract it was specifically provided that each party had the right of specific performance. Yet before the month of August 1983 elapsed, Chambers, acting on behalf of himself and CTR, attempted to buy out of the Agreement; failing in this attempt he became unresponsive to NASCO's efforts to consummate the Agreement, citing repeatedly a failed bond issue problem of his own which had no connection whatsoever with the Agreement, although Chambers acknowledged that he and CTR were legally bound under the Agreement to submit CTR's portion of the application for transfer on September 23, 1983, they failed to do so. This failure slowly solidified into refusal and finally NASCO notified defendants' Atlanta attorneys (Chambers' Lake Charles attorneys had no part in negotiating the Agreeement) that NASCO would file suit in federal court in Alexandria October 17, 1983 seeking specific performance and injuctive relief. Defendants have continuously contested the adequacy of that notice. If that is true, then it is by lucky happenstance and coincidence that Chambers induced his Lake Charles attorneys to come to their office on the afternoon of Sunday, September 16, 1983, and to draft a trust in favor of his three children as beneficiaries and having a corpus of $1,000.00. They urge that the following series of events occurred on Sunday, October 16, 1983 without knowledge by CTR, Chambers, or their attorneys that NASCO had given notice that they would file suit for injunctive relief on the morning of Monday, October 17, 1983. The conversation recited below between the Chairman of the Board of CTR and Chambers did not actually occur since Chambers was Chairman.

Suddenly on Sunday, October 16, 1983 it occurred to CTR's Chairman of the Board and to its President that the corporate interest of CTR would be best served by selling its principal operating properties, not their license, to some third party other than NASCO.

Although it was Sunday, they contacted their

attorneys in Lake Charles and discovered that these attorneys also represented a Mr. Chambers, who had just confected a trust possessing uncommitted assets of $1,000.00 in cash, that the Trustee had not yet been named but that Mr. Chambers has in mind a very capable and experienced business woman named Baker who was a college graduate with a Bachelor of Science, who worked for years for the State of Alabama and was the administrative head of her state agency in Birmingham prior to her retirement a few years before. Thereupon, the attorney hands the phone to Mr. Chambers and the following conversation ensues:

> Chairman: Mr. Chambers, I am the Chairman of CTR. We have decided to sell the principal operating properties of our company and thought that your trust might be interested in such a sale.
>
> Chambers: Yes, I'm familiar with the property, it's a solid single purpose facility and I'm sure that Mrs. Baker, the trustee that I have in mind, will be able to see the advantages of the trust owning a TV station and a transmitting tower, both in good condition and ready for use.
>
> Chairman: But we're certainly not going to sell the properties for $1,000.00?
>
> Chambers: Certainly not. I'm familiar with the properties and I propose a purchase price of 1.4 million dollars.
>
> Chairman: But the trust doesn't possess 1.4 million dollars, does it?
>
> Chambers: The Trustee will sign a note.
>
> Chairman: Oh, a sale and mortgage, we must have security.



> Chambers: We can't agree to a sale and mortgage. That would require the signature of the Trustee on the deed. The Trustee lives in Birmingham, Alabama and we could never get her signature in time to record the deed in time to be the first recorded instrument in the Clerk of Court's office tomorrow morning. Therefore, it will have to be in the form of a Cash Sale.
>
> Chairman: But you are proposing a 100% credit deal for 1.4 million dollars. If I am getting just a note, how can it be handled as a cash sale?
>
> Chambers: That's just a matter of recordation. It's the strong policy of the State of Louisiana. Ask your attorneys, uh -- I mean our attorneys.
>
> Chairman: Look, Mr. Chambers, like I said, I don't see how we can handle this as a Cash Sale when CTR is receiving a note. And I certainly can't vacate and deliver these premises by tomorrow morning. What's the big hurry anyway?
>
> Chambers: All we have to do is use the usual Cash Sale form and insert the consideration as 1.4 million dollars.
>
> Chairman: Yes, I'm familiar with that form. In the Cash Sale forms I've seen the recited consideration is followed by some kind of language as "cash in hand paid, receipt of which is hereby acknowledged" or words to that effect. CTR can't acknowledge receipt of 1.4 million dollars cash.
>
> Chambers: Look, I've talked this over with our attorneys. We're drafting a warranty deed based on a conventional Cash Sale form and leaving out the language by which CTR would acknowledge receipt of cash. This way you would not be making such an acknowledgement; there would be a

mere implication. The public would imply delivery of the purchase price even though CTR has not specifically acknowledged such receipt. It's just a matter of recordation. It's the very strong public policy of the State of Louisiana our attorneys tell me despite any actual delivery of the property or the stated purchase price or the claims of fraud or collusion between the parties. That's the law. That's the strong policy of the State of Louisiana.

Chairman: Listen - I know something about these matters. I haven't even talked to Mrs. Baker. She doesn't know what property has been sold or the price she is expected to pay. How can there be agreement on these matters when I haven't even talked to her, and she doesn't even know that there is a sale? She has to be a purchaser in good faith and buy a valid deed, I do not have to talk to our attorneys to know that. She doesn't know that I have made an offer and I do not know that she has accepted.

Chambers: Can't you understand? It's just a matter of recordation. Just a matter of recordation. If we record the deed, she's automatically a purchaser in good faith.

Chairman: Well I still don't understand why we can't recite it like it is; that CTR gets a note and that CTR gets the security of a mortgage. Why shouldn't I talk to the Trustee? Why shouldn't she sign the deed if she's willing to sign the note? Why is it so damn important that the transfer be recorded as soon as the Clerk's Office opens tomorrow morning?

Chambers: Look, do you want the deal or don't you?



Chairman: Well, how am I going to explain to my shareholders?

Chambers: Look, Bub, I *am* your shareholders.

Chairman: Well, it still looks a little fishy to me.

(end of scenario)

It suffices to say that the deed from CTR to Baker was null and void for lack of delivery of possession to the vendee and lack of delivery of consideration to the vendor. This was true at the time that the deed was recorded on or about 8:30 a.m. on Monday, October 17, 1983. It was true when attorney Gray received notice of the issuance of the TRO at the conclusion of the hearing on or about 1:34 p.m. on the same day. It was true when Chambers, by his own admission, had notice of the TRO on Tuesday, October 18, 1983. The deed called for dollars, that is cash. A worthless note is not the equivalent of cash. The lease executed on October 25, 1983 was an attempt to cure these deficiencies in the Cash Sale and were acts in violation of the TRO against Chambers and CTR issued by this Court on October 17, 1983. Defendants have no likelihood of success on appeal.

(2) Defendants will be irreparably injured if the stay is not granted.

Defendants argue that key employees will be replaced and others may lose their jobs, that station policies may be changed. It should be observed that it was Chambers and CTR, not this Court, that signed the Agreement. It was their decision to sell the station.

(3) Possibility of substantial harm to other parties to the litigation.

Defendants, since the very beginning of this trial, have relied completely on tactics of expense and delay - a series of contrived defenses, each of which consumed its own expenditure of time and money for trial. They appear

in endless succession limited only by their attorney-architect's ability and imagination to think of them. A partial list includes first and most importantly the alleged sale from CTR to Baker-Trustee. Next, the refusal to allow the examination of files and records, etc. by NASCO which provoked a lengthy contempt proceeding. Next, the alleged violation by NASCO of the conditions of a pre-August 9, 1983 verbal agreement recalled only by Chambers and not mentioned in the August 9th agreement or anywhere else; next were numerous alleged defaults by NASCO previous to September 23, 1983; next a series of depositions of the officers of various financial institutions and other companies with which NASCO had done business which became so numerous as to draw the attention of the court and none of whom have been called upon to testify; then mandamus; then attempt at recusal of the Court; then a series of requests for continuance by Chambers and by his counsel. The first two were granted. But when it became apparent that this was part of the continuing tactic of delay, they were refused.

It has been pointed out previously that this is a simple case - specific performance of the August 9, 1983 agreement between NASCO, CTR and Chambers. It is stipulated by the parties that the Agreement was legal, valid and enforceable on September 23, 1983. It has been stipulated that Chambers and CTR breached that agreement when they failed or refused to submit CTR's portion of the joint application to the FCC for the transfer of the license. Defendants have admitted repeatedly that the reason for the sale from CTR to Baker, Trustee, was to deprive NASCO of their right of specific performance as provided in the Agreement and the laws of the State of Louisiana. From the filing of the original answer, the sole issue has been whether the sale by CTR is protected by the Public Records Doctrine of Louisiana. The pleadings alone to this date filled fourteen volumes of the record. The documentary evidence is equally voluminous. The August agreement set a specific date for submitting the joint



application for transfer to the FCC. It required in detail the cooperation of Chambers, CTR and NASCO and stated, again specifically, that time was of the essence. On August 9, 1983 the parties contemplated the completion of the entire sale in a period of a few months.

Two and a half years and fourteen volumes of trial court pleadings later, after this case has been exposed three times to the appeal court, after all the evidence is in, all authorities submitted, an Opinion and Judgment has been rendered granting specific performance and ordering defendants Chambers and CTR to cooperate and to perform their obligations under the admittedly legal and enforceable Agreement, defendants seek a stay so that Chambers and CTR may remain in control and operation of the license and the properties and achieve additional delay and expense to plaintiffs by conducting a flanking attack against NASCO through petitions to the FCC. This matters surfaced originally after the issuance of our November 8, 1985 Opinion. See the following letters following the Minute Entry (239) being among the last filings in the rear of Volume 13 of this record, letter from A. J. Gray, III to this Court dated November 18, 1985 with attached letter from John B. Scofield to Mr. A. J. Gray, III dated November 12, 1985, and another attached letter from Stanley S. Neustadt to A. J. Gray, III, Esq. dated November 14, 1985. It is more clearly outlined in the letter from A. J. Gray, III to this Court dated December 12, 1985 (247), letter from David L. Hoskins to this Court dated December 13, 1985 (248), and letter from this Court to Mr. Gray dated December 20, 1985 (249). It is submitted that this red herring has a potential of unlimited additional time, effort and expense. NASCO would be seriously, substantially and irreparably harmed by the issuance of a stay.

(4) the granting of a stay would serve the public interest.

The argument here is simply that Mr. and Mrs. Chambers are indispensable to the operation of the station.

To this we point out again that Chambers and CTR, not this Court, signed the Agreement. It was their decision to sell the station. It was not against public policy at that time nor is it so at present.

## CONCLUSION

We stay therefore until further orders of this Court that portion of Paragraph XI which reads as follows: "and that the plaintiff, NASCO, Inc., shall submit the appropriate Memorandum of Costs in accordance with Rule 5(c) of the Local Rules of this Court within thirty (30) days of the entry of this Judgment." In all other respects defendants' Motions for Stay are DENIED.

Because Christmas Day is imminent, the temporary stay should not terminate until December 26, 1985 (not inclusive) and all legal delays will commence on that date.

DONE AND SIGNED at Alexandria, Louisiana, this 22nd day of December, 1985.

/ Nauman S. Scott
UNITED STATES DISTRICT JUDGE

[1] These numbers and those that follow refer to numbered documents in the record.



IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

FILED DEC 22 1985

NASCO, INC.
-vs- : CIVIL ACTION NO. 83-2564
CALCASIEU TELEVISION & RADIO, ET AL

*J U D G M E N T*

The Motions for Stay and the opposition thereto having been considered; it is

ORDERED, ADJUDGED AND DECREED that that portion of Paragraph XI of our Judgment of November 27, 1985 which reads as follows: "and that the plaintiff, NASCO, Inc., shall submit the appropriate Memorandum of Costs in accordance with Rule 5(c) of the Local Rules of this Court within thirty (30) days of the entry of this Judgment." be and it is hereby stayed until further orders of this Court. In all other respects defendants' Motions for Stay are DENIED. It is further

ORDERED, ADJUDGED AND DECREED that the temporary stay granted for the purpose of our considering defendants' Motions to Stay be terminated effective December 26, 1985, which date shall be the effective date for the commencement of all legal delays.

Alexandria, Louisiana, this 22 day of December, 1985.

/s/ Nauman S. Scott
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed AUG 6 1986

No. 86-4003

NASCO, INC.

Plaintiff-Appellee,

versus

CALCASIEU T.V. AND
RADIO, INC. AND G.
RUSSELL CHAMBERS,

Defendants-Appellants,

MABEL C. BAKER,
TRUSTEE,

Defendant-Appellant.

Appeals from the United States District Court for the
Western District of Louisiana

(August 6, 1986)

Before JOLLY, HILL and JONES, Circuit Judges.

BY THE COURT:

The court, having considered the briefs, record and oral arguments, affirms in all respects the judgment and order of the district court.

The court is of the opinion that the issues raised in this appeal are frivolous and that damages and double costs under Fed. R. App. P. 38 should be imposed against the appellants in the amount of the costs of this appeal, including attorney fees. Accordingly, the case is remanded to the district court for a determination of the costs and attorney's fees incurred by appellees in this appeal and, additionally, for a determination of whether sanctions in the form of costs and attorney's fees should be imposed



against the appellants and/or their attorneys under Fed. R. Civ. P. 11 and against counsel for appellants under 28 U.S.C. §1927 as it relates to the proceedings in the district court.

This court reserves the right to issue an opinion in support of this order at a later time.

**AFFIRMED** and **REMANDED.**

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Filed AUG 11 1986

No. 86-4003

NASCO, INC.

-vs- Plaintiff-Appellee,

versus

CALCASIEU T.V. AND
RADIO, INC. AND G.
RUSSELL CHAMBERS,

Defendants-Appellants,

MABEL C. BAKER,
TRUSTEE,

Defendant-Appellant.

Appeals from the United States District Court for the Western District of Louisiana

(August 11, 1986)

Before JOLLY, HILL and JONES, Circuit Judges.

BY THE COURT:*

The court, having considered the briefs, record and oral arguments, affirms in all respects the judgment and order of the district court.

The court is of the opinion that the issues raised in this appeal are frivolous and that the appeal has been brought for purposes of delay. Damages and double costs under Fed. R. App. P. 38 should therefore be and are hereby imposed against. Damages will be in the amount of appellees' attorney's fees, if reasonable, expended in the prosecution of this appeal. Accordingly, the case is

* This order amends our order of August 6, 1986.



remanded to the district court for a determination of the costs and attorney's fees incurred by the appellees in this appeal. Additionally, we remand for a determination of whether sanctions in the form of costs and attorney's fees should be imposed against the appellants and/or their attorneys under Fed. R. Civ. P. 11 and against counsel for the appellants under 28 U.S.C. § 1927 as it relates to the proceedings in the district court.

This court reserves the right to issue an opinion in support of this order at a later time.

AFFIRMED AND REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 86-4003

NASCO, INC.

Plaintiff-Appellee,

versus

CALCASIEU T.V. AND
RADIO, INC. AND G.
RUSSELL CHAMBERS,

Defendants-Appellants,

MABEL C. BAKER,
TRUSTEE,

Defendant-Appellant.

Appeals from the United States District Court for the
Western District of Louisiana

(August 27, 1986)

Before JOLLY, HILL and JONES, Circuit Judges.

PER CURIAM:*

In our order of August 6, we imposed damages and double costs for this appeal, including attorney's fees, against the appellants under Federal Rule of Appellate Procedure 38. We remanded to the district court for determination of those amounts. We also instructed the district court on remand to consider whether sanctions should be imposed against the appellants and/or their attorneys under Federal Rule of Civil Procedure 11 and against counsel for

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.



appellants under Federal Rule of Appellate Procedure 38. We remanded to the district court for determination of those amounts. We also instructed the district court on remand to consider whether sanctions should be imposed against the appellants and/or their attorneys under Federal Rule of Civil Procedure 11 and against counsel for appellants under 28 U.S.C. § 1927 for the proceedings in the district court. Finally, we noted that we reserved the right to issue an opinion in support of the order at a later time; we now issue that opinion. The district court's opinion in this case adequately reflects our view of the merits of the case. We address only our determination that damages and costs are appropriate under Rule 38 because the appeal is frivolous and dilatory.

A primary reason that this appeal is so clearly frivolous and was pursued for the purpose of delay lies in the nature of the facts, facts that the district court determined clearly and accurately. Indeed, there was virtually no disagreement on the facts, only on the conclusions to be drawn from them. The facts themselves, however, so overwhelmingly support the district court's conclusions and findings that any appeal that must characterize its factual determinations as clearly erroneous is plainly frivolous.

The frivolousness of this appeal and its dilatory purpose is further demonstrated by the bad faith shown by the appellants before and during this litigation. The validity of the purchase agreement, its unjustified breach, and the eleventh hour creation of a sham trust to avoid that agreement in the shadow of approaching legal proceedings were not contested by the appellants. These actions plainly show that the appellants intended to manipulate the legal process to escape their own voluntarily undertaken obligations.

The appellants' legal arguments were singularly unconvincing in view of the glaring facts that the arguments ignored. The arguments relied on the trust that the district court found was created for the sole purpose of avoiding

the sale to Nasco. Acceptance of this trust as valid would completely obliterate the nullity of simulations under Louisiana law. As judges, we cannot check our common sense in the robing room and allow disingenuous arguments to characterize as serious an appeal as manipulative as is this one before us.

Finally, it is obvious in the context of this case that this appeal was brought for the sole purpose of delay. These appellants have brought several previous meritless appeals and petitions before this court. Clearly, this appeal was one last shot at delaying the inevitable. Although appellants have the right to appeal, when they impose upon the other parties and upon the public an appeal like this, under Rule 38 they also have the responsibility to pay. Therefore, in accordance with our order entered August 6, the district court is affirmed and the case is remanded.

With respect to our remand to consider imposition of sanctions under Rule 11, Fed. R. Civ. P., and 28 U.S.C. 1927 in connection with the district court proceedings, we express no opinion whatsoever on the merits.

R E M A N D E D.



IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

FILED AUG 07 1986

CIVIL ACTIONNO. 83-2564

NASCO, INC.

versus

CALCASIEU TELEVISION AND RADIO, INC.,
G. RUSSEL CHAMBERS and
MABLE CHRISTINE BAKER,
TRUSTEE FOR THE FACILITY TRUST

FOR PLAINTIFF:

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NAUMAN S. SCOTT
UNITED STATES DISTRICT JUDGE

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## OPINION

This matter is before us on a Motion for Judicial Assistance and/or Supervision filed by the plaintiff, NASCO, Inc. (NASCO).

NASCO's motion arises out of an action in diversity for the specific performance of a Purchase Agreement (the Agreement) executed on August 9, 1983. The Agreement provides for the sale and purchase of television station KPLC-TV in Lake Charles, Louisiana. NASCO is the prospective purchaser of the station. The defendants in the underlying action are Calcasieu Television and Radio, Inc. (CTR), the owner and defaulting seller of the station, and G. Russell Chambers (Chambers), the sole shareholder and sole Director of CTR, who signed the Agreement both on behalf of the corporation, and in his individual capacity. The third defendant, Mabel Christine Baker, is not a party to the motion now before us.

The action for specific performance was tried to the Court without a jury on April 17, 1985. On November 8, 1985, we issued a written opinion embodying our Findings of Fact and Conclusions of Law, which are incorporated herein by reference. Judgment was rendered in favor of NASCO on December 2, 1985, in accordance with our written opinion. Chambers and CTR were, among other things, ordered to perform, fully and in good faith, the obligations undertaken by them pursuant to the Agreement. We refused a stay and retained jurisdiction for the purpose of implementing the execution of our judgment and the Purchase Agreement. Thus the judgment is now executory.

On the instant motion, NASCO seeks our assistance and/or supervision in resolving certain disputed issues which have arisen between the parties, and which now threaten to impede the closing of the sale of KPLC-TV. Specifically, NASCO prays: (1) That the material physical assets of CTR currently used directly in the business and operation of the station be conveyed to NASCO at the

original purchase price, pursuant to the terms of the Agreement; (2) that Chambers and CTR bear the expense of certain repair and maintenance work needed to bring two station transmission towers into a state of normal repair; (3) that the intangible personal property to be conveyed pursuant to the Agreement are to include the station's telephone numbers, post office box, and unemployment tax rate;[1] (4) that prepaid premiums for current insurance coverage on station assets are not to be prorated between the parties at closing under the terms of the Agreement; (5) that the $18 million dollar purchase price be paid into the Registry of the Court, pending the removal of any cloud on the title, including that presented by the appeals that are now pending from the final judgment rendered herein; and (6) that the contractual deadlines for the fulfillment of the conditions precedent to the sellers' obligations under the Agreement be extended in light of the delays encountered in obtaining final Federal Communications Commission (FCC) approval of the license transfer application.

An evidentiary hearing on these issues commenced on July 16, 1986. After recess, the hearing resumed on July 21, 1986, and was completed the following day. At the commencement of the hearing, we allowed the filing of an intervention on behalf of the Calcasieu Marine National Bank of Lake Charles, Louisiana (the Bank), asserting security interests in certain properties at issue on this motion, as well as in certain other properties and assets covered by the Agreement. The Bank asks to be paid with preference and priority out of the proceeds of the sale of KPLC-TV.

Unless resolved, the issues presented on this motion will clearly impede the consummation of the Agreement and the implementation of our final judgment. The appeals now pending on the merits notwithstanding, we have jurisdiction to adjudicate these issues, pursuant to our powers as a court of equity, and pursuant to the express retention of jurisdiction embodied in Paragraph X of the



judgment rendered herein. The pendency of the defendants appeals does not divest us of that jurisdiction. *Nicol v. Gulf Fleet Supply Vessels, Inc.*, 743 F.2d 298, 299, n. 2 (5th Cir. 1984).

## FINDINGS OF FACT

1.

The Findings of Fact set out in our written opinion of November 8, 1985, are adopted by reference herein.

2.

Although the parties appeared at one time to have been in agreement that the required FCC approval of the license transfer application became final on July 21, 1986, that, and perhaps other deadlines apparently are now in dispute.

3.

Time is of the essence in this transaction.

A. *Tangible Assets:*

4. –

The object of the sale contemplated by the Agreement is television station KPLC-TV — an ongoing business enterprise. That sale was to be accomplished through an asset purchase of its broadcast facilities, tangible and intangible assets, and licenses. *See* Testimony of Patrick Redden, 4 Tr. 107, 110-11.[2]

5.

The tangible assets to be conveyed pursuant to the Agreement are the material physical assets of CTR that are used directly in the business and operation of the station, that is KPLC-TV.

The Agreement defines the purchased assets as including the tangible personal property described in Agreement Exhibit B used for the direct operation of the station. Purchase Agreement, ¶ 1(a)(ii), at p. 2. The Agreement further obliges the sellers to represent, warrant, and covenant that Exhibit B is a true and accurate description of the material physical assets owned by CTR and used directly in the business and operation of the station. *Id.*, ¶ 9(b), at p. 11. The Agreement further provides that NASCO's obligations under the Agreement shall be subject to the fulfillment and performance of certain conditions as of the date of closing — namely, that the seller's representation, warranty, and covenant with respect to the accuracy of Exhibit B as a list of the material physical assets of the station is substantially true, and without material change adverse to NASCO, as of the date of closing. *Id.*, ¶ 11(a)(i), at p. 15.

6.

Exhibit B is an inventory of station assets prepared by various station department heads in January, 1983 for purposes unrelated to the sale of KPLC-TV to NASCO. Testimony of Rita Chambers, 2 Tr. 18, 49-51. No reinventory or other activity was undertaken by station personnel prior to August 9, 1983 to assure the current accuracy of that exhibit as a list of the material physical assets used directly in the business and operation of the station. *Id.* at 51. Indeed, several material physical assets then used directly in station operations were omitted from that exhibit. *Id.* at 51-54

7.

Exhibit B, therefore, did not represent a true and accurate listing of the material physical assets used directly in the business and operation of television station KPLC-TV as of August 9, 1983. *Id.* Nor did it furnish, therefore, a true base for identifying the assets to be transferred at the date of closing.



8.

The sellers' warranty and covenant that Exhibit B is a true and accurate list of the material physical assets of CTR used in station operations is a continuing warranty and shall survive delivery of the assets and payment of the purchase price. Purchase Agreement, ¶ 15, at p. 23. Thus, it was contemplated by the parties that NASCO would test the fulfillment and performance of that covenant by conducting its own inventory of station assets prior to closing. *Id.*, ¶ 19(a), at p. 29.

Because of the defendants' breach of the Agreement, NASCO's initial inventory was not conducted until October 1983.

9.

Between March 1983 and January 1986, certain items of tangible personal property were acquired by CTR. These assets, which included television broadcast and production equipment, vehicles, and office and accounting equipment, were installed at the broadcast facilities of KPLC-TV and have thereafter been used directly in the daily business and operation of the station. These assets were not listed on Agreement Exhibit B.

10.

On August 5, 1983, Calcasieu *TV* and Radio, Inc. (CAL-TV), a wholly owned subsidiary of CTR, was incorporated. The officers of that corporation are G. Russell Chambers, the sole shareholder and Director of CTR; Rita S. Chambers, the President of CTR; and Albert Smith, the Executive Vice President for Engineering of CTR. The purported purpose of this subsidiary corporation was the production of commercial videotapes.

11.

The officers of CTR confected a series of seventeen "Equipment Lease Agreements" which were placed into

evidence in this matter. *See* Exhibits P-3 through P-19. These documents purport to have been executed between August 5, 1983, and January 21, 1986 — with two leases dated in 1983, seven in 1984, seven in 1985, and one in 1986. These leases purport to cover some $644,072.40 worth of tangible assets acquired by CTR between March 1983 and January 1986. Each lease is executed by Albert Smith on behalf of CAL-TV, as lessor, and by Rita Chambers on behalf of CTR, as lessee. Under the terms of these various lease agreements, CTR is required to pay some $1,214,689.40 in rental payments to CAL-TV — an amount nearly double the aggregate invoice prices of the covered assets.

12.

These "lease agreements" are nothing more than instruments of deception:

(a) In response to NASCO's subpoena *duces tecum* for the seventeen lease agreements, together with their associated invoices, checks, and vehicle registration certificates, CTR produced Xerox copies of the leases. NASCO subsequently insisted that the original leases be produced. *See* Exhibit D-9 (*in globo*). Examination of the original lease documents shows that the dates on the majority of the documents have been manually altered.

(b) The two earliest leases are dated August 5, 1983 and December 1, 1983, respectively. Exhibit P-3 and P-4. Mrs. Chambers testified under oath that she had signed those leases on those dates. Testimony of Rita Chambers, 1 Tr. 99, 115-37. She denied under oath that the leases had been backdated. *Id.*, 2 Tr. 79. The evidence shows, however, that on the date she purportedly signed herself "Rita S. *Chambers*" on those leases, she was, in fact, not yet married to Chambers. *Id.* at 80-81. She did not marry Chambers until December 27, 1983. *Id.* at 80.



(c) Albert Smith, an officer of both CTR and CAL-TV, who signed the leases on behalf of CAL-TV, as lessor, admitted under cross-examination that *none* of the equipment lease agreements had been signed until some time in 1986. Testimony of Albert Smith, 3 Tr. 182, 184-85.

(d) All of the equipment covered by these purported leases was paid for with CTR checks — *not* CAL-TV checks. Exhibits P-3 through P-19; Testimony of Rita Chambers, 2 Tr. 18, 62-63. All but one of the seventeen leases shows invoices identifying either CTR or KPLC-TV as the purchaser. The defendants' contention to the contrary notwithstanding, no credible evidence was adduced suggesting that the ownership of the leased assets was vested in any entity other than CTR. Indeed, several of the assets covered by the lease agreements — namely, those on Lease 1B (Exhibit P-4), Lease 2 (Exhibit P-5), and Lease 6 (Exhibit P-9) — are clearly owned by CTR, the purported lessee, and *not* by CAL-TV, the purported lessor.

(e) The equipment covered by Lease 2 (Exhibit P-5) is also listed on Agreement Exhibit B — the defendants' own inventory of station assets to be conveyed, prepared in January 1983. Testimony of Rita Chambers, 2 Tr. 18, 78. Despite direct questioning, no rational explanation was given by the defendants' witnesses as to how or why equipment clearly designated by the defendants themselves as purchased assets in August of 1983 managed to show up on a backdated equipment lease agreement identifying CTR (the owner of that equipment) as the lessee.

13.

We find that the purpose of these purported lease

agreements was to create the *appearance* of ownership of the covered assets by CAL-TV as opposed to CTR, *see* Testimony of Albert Smith, 4 Tr. 1, 95; to create the *appearance* that the assets covered by these leases had been dedicated to nonstation uses; and to deplete station assets and profits by draining off nearly double the aggregate purchase price of the covered equipment, as well as the equipment itself, into a subsidiary corporation that would remain in the defendant's hands after closing.

14.

*All* of the equipment covered by the seventeen Equipment Lease Agreements is, and has been from the date of its acquisition, owned by CTR, installed and maintained at the KPLC-TV broadcast facilities, and used predominantly, if not exclusively, in the direct business and operation of the station. Testimony of Rita Chambers, 2 Tr. 18, 65-68; Testimony of Albert Smith, 3 Tr. 182, 188-89; *Id.*, 4 Tr. 1, 6-7, 16-45.

15.

CAL-TV has had no production activities to which the disputed assets could have been dedicated.

Mrs. Chambers initially testified under oath that the source of CAL-TV's income was its production activities, that CAL-TV has earned production income during its existence, and that it has had no other source of income other than production. Testimony of Rita Chambers, 1 Tr. 99, 106-07. On closer cross-examination, she admitted that the rental payments under the seventeen purported lease agreements was a *second* source of income. *Id.* at 108. On being confronted with CAL-TV's monthly financial statements for the period ending June 30, 1986, however, she admitted that no production income at all had been earned by CAL-TV in 1986. *Id.* at 111, 114. Subsequently, after CAL-TV's monthly financial statements for the years 1983 through 1986 had been subpoenaed and produced, she finally conceded that CAL-TV had earned no production income whatsoever during the entire course of its existence. *Id.*, 2 Tr. 18, 72, 74.



In Mrs. Chambers' words, CAL-TV is, and always has been, a "part-time operatiion." *Id.*, 1 Tr. 99, 103-04. It has had no full-time employees, no regular part-time employees, and no expenditures for employee salaries (other than the salaries paid to Chambers, Mrs. Chambers, and Albert Smith as officers) since its inception. *Id.*, 2 Tr. 18, 68-75; *Id.*, 1 Tr. 99, 103-06; Exhibits P-25 through P-28.

16.

Defendants would have us believe that the only equipment which is susceptible to being "consumed or depleted"' is automobiles. This theory is reputed by the Purchase Agreement, § 1(a)(ii). The equipment and assets at issue on this motion — including "new equipment and assets acquired after August 9, 1983, and equipment and assets covered by the seventeen purported lease agreements were never used by CAL-TV and constitute direct replacements of "consumed or depleted" equipment and assets listed by the defendants on Agreement Exhibit B, with the exception of the equipment and assets covered by Lease 7A (Exhibit P-10), Lease 9 (Exhibit P-12), Lease 11 (Exhibit P-14), and Lease 13 (Exhibit P-16). Testimony of Al Evans, 3 Tr. 119, 144-53; Exhibit P-37.

The evidence shows, for example, that there were eighteen cameras listed on Exhibit B, and there are eighteen cameras currently in use at KPLC-TV; there were nineteen three quarter inch fixed tape recorders listed on Exhibit B, and there are nineteen such tape recorders now in use; there were ten portable three quarter inch tape recorders listed on Exhibit B, and there are ten such recorders in use today; there were seven editing controllers listed on Exhibit B, and there are five such controllers currently in use; there were thirty-three typewriters listed on Exhibit B, and there are thirty-five in use today; and there

were twenty-one vehicles listed on Exhibit B, and there are twenty-one vehicles now used in the business and operation of the station. Testimony of Al Evans, 3 Tr. 119, 131-43; Exhibit P-36.

The additional equipment and assets identified above can only be characterized as indirect replacements of assets listed on Exhibit B. Under direct examination by defense counsel, Albert Smith, the CTR Executive Vice President for Engineering, was taken laboriously through each and every asset on each and every lease agreement. As to each such item, he testified that it was installed at the KPLC-TV studio site, that it had been removed from service on July 18, 1986, that it had been used directly in the business and operation of the station prior to that date, and that its function at the station was now being served by an asset listed on Exhibit B. Testimony of Albert Smith, 4 Tr. 1, 16-45. A clearer characterization of these assets (which include the equipment used in the daily weathercasts and the computer which handles station payroll funtions) as replacements could hardly be imagined. These items of equipment which were one of the principal matters in contention at the hearing of plaintiff's motion were removed on advice of defendants' counsel without notice to opposing counsel or the Court and during the pendency of the hearing. To maintain the status quo we ordered them to be reinstalled.

17.

*All* of the equipment and assets at issue on this motion are material physical assets of CTR used directly in the business and operation of television station KPLC-TV.

The evidence is uncontroverted that all of these disputed items were being used in the operation of the Station from the time that each was installed. There is no provision in the Agreement which authorizes their removal. They become dedicated to Station use, and to transfer under the Agreement, from the moment they were



installed. The incorporation of these assets into station functions has altered both the Station's on-air "look," and its daily business and technical operations. Removal of the disputed assets from the Station would result in an immediate deterioration of Station functions, readily and immediately perceivable by the viewing public and Station employees.

18.

We find that the equipment and asset inventory conducted by NASCO in April of 1986, as exemplified in Exhibits P-30, P-31, and P-35, is uncontested and represents the complete, true, and accurate listing of the material physicial assets currently used by CTR directly in the business and operation of television station KPLC-TV.

B. *Condition of Towers:*

19.

Among the properties and assets to be sold to NASCO pursuant to the Agreement are two transmission towers — a 1,400 foot transmission tower situated in Jefferson Davis Parish, and a 400 foot auxiliary tower situated at the KPLC-TV studio site in downtown Lake Charles. Purchase Agreement, ¶ 1(a)(i), at p. 2. These towers are clearly included withn the property descriptions set forth in Exhibit A to the Agreement, which exhibit is expressly identified as describing property used directly in the business and operation of the station. *Id.*, ¶ 1(a)(i), at p. 2 *Id.*, ¶ 9(b), at p. 11; *Id.*, Exhibit A.

20.

With respect to the maintenance and repair of such assets, the Agreement provides that the Seller "shall, at its own expense, keep in a normal state of repair and operating efficiency *all tangible personal property and assets currently used in the operation of Station.*" *Id.*, ¶ 9(i), at p. 13 (emphasis added).

21.

We find that the two transmission towers covered by the Agreement are in a state of normal repair and operating efficiency except that the Jefferson Davis tower requires the retensioning of all guy wires in accordance with design specifications, Deposition of Robert Shoolbred, at pp. 11-13, 17-18, 29-32. Testimony of Normal Coaba, 3 Tr. 211, 221-22, 240; and the coating of guy wires and winchlift cables to prevent rusting. Deposition of Robert Shoolbred, at pp. 16, 18 32-33. The repair of guy wire ground connections, in order to eliminate the junctions of dissimilar metals, has already been completed by the defendants. Testimony of Norman Coaba, 3 Tr. 211, 230-31.

C. *Intangible Assets:*

22.

The Agreement requires the conveyance to NASCO of "(a)11 intangible personal proterty used by Seller in the direct operation of the Station." Purchase Agreement, ¶ 1(a)(iii), at p. 2 (emphasis added).

23.

The Station's telephone numbers, post office box, and unemployment tax rate, as well as the music and music rights owned by or licensed to the Station, are intangible personal property within the meaning of Paragraph 1 of the Agreement.

24.

The defendants concede in brief that the music and music rights owned by or licensed to KPLC-TV are to be conveyed to NASCO pursuant to the Agreement.

25.

We find that the telephone numbers currently assigned to KPLC-TV are not utilized by or allocated to



CTR. Testimony of Rita Chambers, 2 Tr. 35-36. Although CTR does share P. O. Box 1448 with KPLC-TV, that box is predominantly associated with KPLC-TV, and not CTR. *Id.* at 31-34; Exhibit P-21. The unemployment tax rate at issue derives exclusively from the employment of KPLC-TV personnel. Testimony of Rita Chambers, 2 Tr. 18, 31-32. Moreover, the evidence establishes that the defendants intend to dissolve CTR as a corporation prior to the closing of the sale. *Id.* at 31. Thus, CTR can have no use whatsoever for these intangible properties after the transaction is consummated.

Accordingly, the Court finds that the telephone numbers, post office box, and unemployment tax rate of KPLC-TV are an integral part of the intangible assets of the station.

D. *Proration of Insurance Premiums:*

26.

The Agreement does not, in express terms, provide for the proration at closing of insurance premiums paid by the defendants for coverage of the purchased assets.

27.

Although the Agreement does provide for the proration of "prepaid items" at closing, Purchase Agreement, ¶ 8(b), at p. 10, no evidence was adduced to indicate that insurance premiums are, by custom or by generally accepted accounting principles, included within the definition of "prepaid items," or that any insurance premiums were in fact, prepaid by the defendants for coverage of purchased assets.

E. *The Cloud on Title:*

28.

The Agreement requires Chambers and CTR to

deliver "full, absolute, marketable and insurable title" to NASCO on the day of closing. Purchase Agreement, ¶ 9(e), at pp. 11-12, ¶ 9(g), at p. 12, ¶ 12, at pp. 16-20.

29.

The appeals lodged by Mable Christine Baker, Chambers, and CTR that are now pending in the United States Court of Appeals for the Fifth Circuit, together with the adverse claims of Mrs. Baker to certain purchased assets, constitute a substantial cloud on the title that is required to be conveyed to NASCO pursuant to the Agreement. So long as those appeals are pending, Chambers and CTR cannot deliver to NASCO the clear title they are required by the Agreement and the judgment of this Court to deliver.

30.

The removal of the cloud on the title to the purchased assets lies within the sole power and will of G. Russell Chambers.

31.

Calcasieu Marine National Bank of Lake Charles, Louisiana has intervened in these proceedings, alleging that defendants CTR and G. Russell Chambers are indebted to the Bank in an amount in excess of $3 million dollars secured by collateral mortgage and other security devices introduced by intervenor into evidence at the hearing on this matter. These instruments might constitute a cloud on the title of certain of the assets to be transferred under the Purchase Agreement. We have retained jurisdiction for the purpose of implementing the execution of our judgment of December 2, 1985 and the Purchase Agreement, and the resolution and disposition of issues posed by intervenors' claimed mortgages and security devices can be resolved at the time of closing of the sale.



F. *Extension of Contractual Deadlines:*

32.

FCC approval of the pending license transfer application became final on July 21, 1986. But for the oppositions filed by CTR Executive Vice President Albert Smith and CTR Vice President Jerry Goos — and particularly the Petition for Reconsideration filed by CTR Vice President Goos — FCC approval of the license transfer application would have become final on May 14, 1986. Testimony of Robert Halprin, 3 Tr. 173, 180-81.

33.

The oppositions filed by CTR Executive Vice President Smith, and the several pleadings in opposition filed by CTR Vice President Goos, were filed with the FCC in direct violation of the express terms of this Court's judgment of December 2, 1985. Judgment, ¶¶ VII, XII.

G. *Credibility:*

34.

The testimony of Rita Chambers is unworthy of belief. It is replete with internal inconsistency, evasion, and misstatement; it evinces a recollection so tainted by bias as to be completely unreliable. At best, it displays a calculated indifference to truth that borders on outright falsehood.

35.

The testimony of Albert Smith is unworthy of belief. Mr. Smith's admitted bias, his desire to help Chambers prevail in this litigation to the fullest extent of his capabilities, his participation in the fabrication of the seventeen bogus lease agreements, and his patently unbelievable insistance that the assets at issue on this motion are dedicated to production activities of CAL-TV

which incontrovertibly have never existed, lead us to reject his testimony.

36.

The testimony of Patrick Redden is unworthy of belief. Mr. Redden testified in detail and under oath that he examined, or had access to, the purporated equipment lease agreements in the course of preparing the year-end audits for the years 1983, 1984, and 1985. Testimony of Patrick Redden, 4 Tr. 107, 132-34, when in fact those leases were not confected, and did not exist, until some time in 1986. Mr. Redden's testimony in this regard so far diverges from the reality of the matter that the Court must reject his testimony.

## CONCLUSIONS OF LAW

We reject at the outset the defendants' attempts to characterize this proceeding as a suit in equity for injunctive relief, imposing upon NASCO the burden of proving that its "remedy at law for the breach of contract it alleges" is inadequate. This is not a suit in equity for injunctive relief. It is a motion for judicial assistance in implementing the judgment of the Court. NASCO has already proved its entitlement to equitable relief for the defendants' breach of contract, and has already been awarded that relief. Whether NASCO has an "adequate remedy at law" is not at issue on this motion.

We also reject the defendants' attempts to characterize this motion as a request for a partial stay of the judgment of December 2, 1985, imposing upon NASCO the burden of proving that it will suffer irreparable harm if the requested relief is not granted. This suggestion is as disingenuous as it is ludicrous. This is not a motion for a stay.

The instant motion is simply a request for judicial assistance in resolving certain disputed matters so that the transaction contemplated in the Purchase Agreement, and



ordered consummated by this Court in its final judgment, can at long last be closed.

A. *Tangible Assets:*

At issue on this motion are tangible assets in use of KPLC-TV on August 9, 1983 but omitted by Chambers and CTR from Agreement Exhibit B, as well as certain tangible assets now in use at KPLC-TV and acquired by CTR during the three year delay caused by the defendants' breach of the Agreement.

The question is whether these assets, not listed on Exhibit B, are required to be conveyed to NASCO for the original purchase price.

We adopt defendants' suggested conclusion of law:

> "13. Where, as here, the Court orders specific performance of a contract, it must enforce that contract according to the letter of the contract. The Court has no power to reform the contract in the process of enforcing it. *Bielawski v. Landry*, 397 So.2d 861, 864 (La.Ct.App.), *cert. denied*, 400 So.2d 904 (1981). Moreover, where the terms of the contract are clear and explicit, and lead to no absurd result, the terms of the contract may not be varied or contradicted by parol evidence. *Sims-Smith, Ltd. v. Stokes*, 466 So.2d 480, 483 (La.Ct.App. 1985). The Court cannot create an ambiguity in the contract where none exists or rewrite the agreement made by the parties. *In re Jurisich*, 224 La. 326, 331, 69 So.2d 361, 363 (1953). Tennessee law is in accord. *Jones v. Brooks*, 696 S.W.2d 885 (Tenn. 1985)."

Utilizing this standard, as well as statements, arguments, concessions of defendants, we find that the Agreement contemplates (and expressly states the intent of the parties) the transfer for an agreed consideration of

$18 million dollars an operating facility, namely KPLC-TV and more specifically the sale and transfer of all assets and rights directly used and useful in the business and direct operation of the Station at the date of closing.

The effect of the Agreement cannot be determined by citing and considering this or that provision of the Agreement in isolation. The true meaning can only be ascertained by contemplating such provisions in context, that is, in relation to all the other provisions in the Agreement. For instance, in support of their contention that the tangible items to be transferred be limited strictly to those items listed in Schedule B, defendants have cited repeatedly the following paragraph from the Agreement:

> "1(a)(ii). The tangible personal property described in *Exhibit B* attached hereto used for the direct operation of Station, except such part thereof as may be consumed or depleted in the normal and ordinary course of business prior to Closing."

Purchase Agreement 1(a)(ii), at p. 2 (Exhibit P-1).

If we were to agree with defendants' contention, then we would have to find that defendants intended to sell and plaintiff intended to buy only part of the Station (the items described in Schedule B) and that even the Schedule B items would be eliminated from the sale as they were taken off line. Given two or more years of additional litigation and perhaps all the equipment in Schedule B would have to be taken off line. This interpretation thus leads to an absurd result.

Defendants themselves have recognized the absurdity of this contention: (1) Jonathan Golden, Atlanta counsel who represented defendants in the drafting of the Purchase Agreement, has agreed that certain properties owned by CTR at the time of the drafting of the Agreement were omitted and should have been included in Schedule B; (2) Defendants, in their reply brief to the Fifth Circuit on the



appeal of this matter, contended:

> "NASCO contracted to purchase a *television station* and KPLC-TV's current management wishes to continue to operate that same station. If partial specific performance were awarded, neither party would get its wish; the station would simply cease to exist.
>
> * * *
>
> "The authorities cited by NASCO and the court below do not support an award of specific performance when the contract to be performed is for the conveyance of a *business entity* rather than merely a body of movable or immovable property and when that partial specific performance would have the effect of destroying the entity sought to be conveyed." Reply Brief on Behalf of Calcasieu Television and Radio, Inc. and G. Russell Chambers, at pp. 9-10 (emphasis in original).

(3) Defendants have conceded that any "new" assets (i.e., assets not listed on Exhibit B) which, in fact, replace assets listed on Exhibit B are covered by the Agreement and are to be conveyed to NASCO for the original price. Defendants' Opposition to NASCO's Motion for Judicial Assistance and/or Supervision and Pretrial Memorandum, p. 3.

We conclude that the disputed assets at issue on this motion are to be conveyed to NASCO for the original purchase price, pursuant to the terms of the Agreement.

We have found as fact, that *all* of the assets and equipment at issue on this motion constitute direct or indirect replacements of assets listed on Agreement Exhibit B. This finding is based on the testimony adduced, and the credibility determinations made by the Court in response to that testimony. The disputed assets and equipment are

*not* "extra pieces," as the defendants would contend. They are integral and material assets used directly in the daily business and operation of the Station. Without these assets, Station functions would be immediately impaired. Given the defendants' concession as to the transfer of replacement assets, these findings alone are sufficient to warrant the granting of the relief sought by NASCO on this issue.

Beyond that, however, both the language of the Agreement and the equities of the case demand that result.

As has been noted, the object of the sale contemplated by the Agreement is television station KPLC-TV — an ongoing business enterprise. That is what the defendants contracted to sell, and that is what NASCO contracted to buy. NASCO did *not* negotiate and agree to purchase a disembodied inventory of real estate, office and electronic equipment, vehicles, and licenses. It negotiated and agreed to purchase a television station. The conveyance of that object was to be accomplished by means of an asset purchase, rather than a stock purchase. That is, instead of conveying the stock of CTR in order to transfer the Station, the parties agreed to convey the broadcast assets owned by CTR. But the *object* of the sale is, and always was, the *Station.*

That conclusion is supported by the language of the Agreement, which must be construed against the seller. La. Civ. Code art. 2474.

With respect to the tangible personal property involved in the transfer, it is clear that the Agreement contemplates the conveyance of *all* material physical assets of CTR used directly in the business and operation of the Station, as of the date of closing.

The Agreement does define the covered tangible personal property in terms of the inventory listed on Exhibit B to the Agreement. Purchase Agreement, ¶ 1(a)(ii), at p. 2.



But it goes on to require the seller to expressly represent, warrant, and convenant that Exhibit B "represents a *true and accurate* description of the *material physical assets . . .* used . . . directly in the business and operation" of the station. *Id.*, ¶ 9(b), at p. 11 (emphasis added). That language leaves no room for doubt that the tangible personal property intended by the parties to be conveyed is *all* of the *material* physical assets used in the business and operation of the station. *Material* physical assets — not *essential* assets or *necessary* assets. The phrase "material physical assets . . . used . . . directly in the business and operation" of the Station defines the *required* scope of Exhibit B. And the various references to that Exhibit throughout the Agreement incorporate that language by reference. Moreover, Exhibit B can be "true and accurate" as required by the Agreement only if it is complete and inclusive of all such assets. Thus, the Agreement calls for the sale of all material physical assets of CTR used directly in the business and operation of KPLC-TV.

Nor can it be seriously questioned that the Agreement requires the conveyance of those material physical assets as they exist on the date of closing. Paragraph 11(a) provides, in pertinent part:

> The obligations of Buyer . . . under this Agreement shall be subject to fulfillment *prior to or at the Closing* of each of the following conditions:
>
> (i) That *all* of *Seller's representations and warranties* contained in this Agreement *are substantially true* and *without material changes adverse to Buyer as of Closing Date;* and
>
> (ii) That *Seller* has *substantially complied with and performed, without deviation materially adverse to Buyer, all* agreements and conditions required by the Agreement to be performed or complied with *prior to or at*

*the Closing Date.*

*Id.*, ¶ 11(a), at pp. 15-16 (emphasis added).

These covenants and conditions with respect to the truth and accuracy of Exhibit B as a list of the material physical assets used directly in the business and operation of the station, without material adverse change as of the date of closing, are contractual obligations undertaken by the defendants pursuant to the Agreement. They require the defendants to convey the station, together with all material physical assets used directly in its business and operation, as of the date of closing. The judgment of December 2, 1985 orders the defendants to perform those obligations.

Exhibit B was *not* a true and accurate description of the material physical assets used directly in the business and operation of KPLC-TV on August 9, 1983. The evidence establishes without controversy that the inventory (Schedule B) was taken in the ordinary course of business in January 1986 and for reasons entirely unrelated to the Agreement; it was not taken for the purpose of describing the properties to be transferred under the provisions of the Agreement. It was not accurate or all inclusive when made. It certainly is not now.

We have found, as fact, that all of the assets at issue on this motion are direct or indirect replacements of assets listed on Exhibit B (which the defendants concede must be conveyed). We have found that all of the disputed assets are *material* physical assets that are used directly in the business and operation of the Station. We have found that once they have been installed and dedicated to use by KPLC-TV, like the original items they replaced, that dedication cannot be revoked and the equipment cannot be removed unless they are "consumed or depleted" prior to closing. We have found that the exclusion of these assets from the sale would result in a material reduction in the quality of the on-air "look" of Station programming, in the



reliability of the technical functions of the Station — changes which would be immediately perceivable, and immediately perceived, both by the viewing public and Station employees.

The disputed assets must therefore be conveyed.

The equities allow no other resolution.

The immediate dispute now before us is a dispute of the defendants' own creation. The delay in the consummation of this transaction is the direct result of the defendants' initial breach — a breach that was deliberate, calculated, and in absolute bad faith. The inordinate length of that delay is the direct result of a defense attorney strategy which has incorporated every conceivable tactic of delay, deception, evasion, and outright contempt that can be imagined, and which has continued unabated to this day.

The changes in the material physical assets of the station which the defendants now seek to hold back from the closing table were deliberately and systematically made by them in the face of this Court's repeated, unequivocal, and emphatic admonitions that the *status quo ante litem* would be preserved. NASCO managed to forestall one major alteration unilaterally undertaken by the defendants — the construction of a new 2,000 foot antenna tower — only by attempting to initiate contempt proceedings. As a direct result of that incident, this Court enjoined the defendants

> [f]rom any act or acts in furtherance of the construction of new facilities and/or *the relocation, substitution, or other alteration of existing facilities*, except as may be required for the preservation and maintenance of purchased assets or otherwise for the fulfillment of the obligations assumed by the defendants pursuant to the August 9, 1983 Purchase Agreement.

Judgment, ¶ IX(c). But NASCO had no way to know of, or to stop, the material changes that are at issue on this motion.

Throughout the period during which the disputed assets were acquired the defendants were well aware that the sale contemplated by the Agreement would ultimately be consummated. They *stipulated* that the Agreement was valid, binding, and enforceable. They *stipulated* that they had breached the Agreement for reasons of their own. They *stipulated* that NASCO had not. And yet they replace substantial assets with new assets, which were installed and used exclusively at KPLC-TV, not CAL-TV, and replaced "consumed and depleted" equipment. Their removal would immediately degrade the on-air "look" and the daily business and technical functions of the station. Having acquired those assets, the defendants then confected a series of seventeen fraudulent leases which have no discernible legitimate purpose. Indeed, the Court can only conclude that the sole purpose of those leases was to create the *appearance* that the disputed assets are owned by CAL-TV, rather than CTR; to bolster the defendants' contentions that the disputed assets are used exclusively for the nonexistent "production activities" of CAL-TV, instead of station operations; and to siphon off station profits (for which the defendants must ultimately account to NASCO) by allowing CTR to pay out in rentals to CAL-TV some $1.2 million for $600,000 worth of assets which would ultimately be left (along with the rental payments) in the hands of Chambers and CTR at closing.

The defendants argue that they contracted to convey only a 1983 vintage television station to NASCO, and that they are now obliged to deliver only a 1983 vintage station. The problem with that argument is obvious. The defendants' initial obligation was to convey a 1983 vintage station to NASCO *in 1983*. They cannot now fulfill that obligation. It is 1986. And the station is no longer a 1983 vintage station.



To exclude the disputed assets from the sale of KPLC-TV would impose upon the station an immediate deterioration in the quality of its broadcasts, its technical operations, and its daily business functions that would be immediately perceivable both to the viewing public and to the station employees. That deterioration could not be adequately compensated for with mere adjustments in the purchase price or money damages for delay.

We, in our discretion as a court of equity, must fashion relief so as to do substantial justice. In this case, the granting of the requested relief may arguably impose some measure of detriment upon the defendants. but denial of that relief will surely injure NASCO. And if the choice is merely one of allocating an inevitable detriment as between a defaulting, bad faith seller and an innocent purchaser, the choice is an easy one, indeed. We cannot, in equity, allow the plaintiff — already victimized by the defendants' bad faith breach and subsequent bad faith litigation tactics — to be further victimized by the defendants' deliberate scheme to utilize station profits and assets to fund and equip what is in essence a competing production company. We cannot, in equity, allow the delays generated by the defendants' bad faith breach to work to the prejudice of NASCO or to the detriment of station operations. We cannot, in equity, allow the obvious intent of the parties, as embodied in the Agreement, to be defeated by a strained and hypertechnical construction of contractual language.

The disputed assets will therefore be conveyed to NASCO for the original purchase price, and the admittedly incomplete and outdated Exhibit B shall be replaced by Exhibits P-30, P-31, and P-32 (the April 1986 inventory conducted by NASCO) as the true and accurate description.

The testimony adduced at the hearing of this matter suggest that several minor items included on NASCO's 1986 inventory are, in fact, the private property of station

employees, rather than assets of CTR. *See* Testimony of Albert Smith, 4 Tr. 1. 57-59. Those items include: a wall painting, listed on page seventy-four of Exhibit P-30; a three foot potted plant, listed on page seventy-four of Exhibit P-30; a Sanyo four foot freezer, listed on page seventy-five of Exhibit P-30; a Sanyo CX-5500 calculator (Sales #1), a Texas Instruments TI-5015 calculator (Sales #2), a Texas Instruments TI-5100 calculator (Sales #3), a Texas Instruments TI-5100 calculator (Sales #4), a Texas Instruments TI-5040 calculator (Sales #5), a Sears PD-12 calculator (Sales Manager's Office), a Canon P21-D calculator (Sales #7), and a Royal 114PD calculator (Sales #8), listed on pages eighty-six and eighty-seven of Exhibit P-30. Although no credible evidence was adduced sufficient to establish the ownership of these assets by *bona fide* third parties, NASCO has declared its acquiescence in the nonconveyance of these specific items. They are therefore excluded from the assets to be conveyed.

There was also testimony suggestive that certain items included on NASCO's 1986 inventory are, in fact, owned and provided by the network (NBC) and the telephone company (AT&T). *Id.*, at 55-56. These items include: a 13 section video patch panel and three video hairpins (asserted to be owned by AT&T), listed on page eight of Exhibit P-30; and a 15 section video patch panel, 13 video hairpins, a dual audio patch panel, an audio jack pad, and a custom plug panel (asserted to be owned by NBC), listed on page eleven of Exhibit P-30. *Id.* We note expressly that the evidence adduced at trial is insufficient to establish ownership of these assets by *bona fide* third parties. In an abundance of caution, however, and in order to avoid, if possible, the difficulties which might arise in this area, we will specifically order the conveyance to NASCO of whatever right, title, interest, and/or right of use may be held by CTR, and the assignment to NASCO by CTR of CTR's interest in any ongoing contracts with those entities pertaining to that equipment.



B. *Tower Repairs:*

We have found that the two transmission towers at issue on this motion have been maintained by the defendants in a normal state of repair except for the retensioning of guy wires on the Jeff Davis tower as found in our Findings of Fact, paragraph 21.

These towers are tangible assets used in the operation of the station, which the defendants are expressly required to maintain at their expense pursuant to Paragraph 9(i) of the Agreement. This obligation, like the remaining obligations of the Agreement, must be performed. It further appears from the evidence that some of the needed repair work has been done, or is in the process of being done, by the defendants.

Because of the uncertainty of the precise cost of the required maintenance work, we will order that bids be obtained by NASCO from no less than three qualified bidders. If required by the firms submitting bids, the defendants will allow those firms to inspect the towers in question in conjunction with the preparation of the bids. The lowest bid shall be accepted. The cost of the necessary repairs shall be credited against the $18 million purchase price, in accordance with the provisions set forth below.

C. *Intangible Assets:*

The Agreement requires the conveyance of *all* intangible personal property of CTR used in the direct operation of the station. Purchase Agreement, ¶ 1(a)(iii), at p. 2.

The defendants would exclude from these intangible assets the station's telephone numbers, post office box, and unemployment tax rate, arguing that these items are not expressly included in, and are not of the same characater as, those items delineated in the Agreement's exemplary list of such intangibles. The defendants further argue that these items are assets of CTR as a corporation

rather than assets of the station as an ongoing business enterprise. The defendants concede that the music and music rights sought in NASCO's motion are to be conveyed.

The Agreement calls for the conveyance of *all* intangible property used in station operations. It excludes only those assets not used in the direct operation of the station. *Id.*, ¶ 2, at p. 4. The Agreement does not, as the defendants suggest, restrict the purchased intangible assets to those for which CTR will have no use after transferring the station. It expressly calls for the transfer of *all* intangible assets used in the direct operation of the station.

The telephone numbers, post office box, and unemployment tax rate are clearly intangible assets used in the direct operation of the Station within the meaning of the Agreement. The evidence shows that the telephone numbers allocated to the Station are not the telephone numbers allocated to CTR. the post office box is identified with, and used predominately for, the Station. The unemployment tax rate is referable exclusively to the employment of KPLC-TV employees. Beyond that, the defendants' own testimony establishes their intention to dissolve CTR as a corporation when this transaction is closed. Thus, CTR as a corporation has no use for these intangible properties.

The intangible assets in question here are clearly used directly and predominatly in the business and operation of the Station. They are closely identified with the Station as a business entity. They are covered by the express terms of the Agreement. They must be conveyed.

D. *Proration of Insurance Premiums:*

The defendants argue that prepaid premiums for existing insurance coverage on the purchased assets should be prorated as of the date of closing, with that portion of such premiums allocable to postclosing insurance coverage



to be borne by NASCO. Their argument is based on Paragraph 8 of the Purchase Agreement, which provides that "[a]ll . . . prepaid items . . . relating to the Station's operations are to be prorated as of the closing date." Purchase Agreement, ¶ 8(b), at p. 10.

As has been noted, the evidence adduced at the hearing of this matter does not establish that insurance premiums are "prepaid items" within the meaning of the Agreement or that any insurance premiums have, in fact, been prepaid by the defendants.

The defendants' argument on this issue necessarily implies an obligation on the part of NASCO to assume existing contracts of insurance. But the Agreement imposes no such obligation. Under the Agreement, NASCO is required to assume certain specified obligations, none of which includes existing policies or contracts of insurance. *Id.*, ¶ 1(b), at p. 3, and Exhibit E. Nor does it appear from the evidence adduced that such contracts could be assumed. If the testimony of Mrs. Chambers is to be credited, at least a portion of the broadcast assets purchased by NASCO are insured under policies that also cover non-broadcast assets owned by subsidiary corporations. Testimony of Rita Chambers, 2 Tr. 18, 44-45. An obligation to bear the cost of premiums necessarily implies the right to obtain the benefits of the coverage thus purchased. The evidence does not show that this is feasible, or even possible. Indeed, it strongly suggests the contrary.

Moreover, the Agreement expressly requires the defendants to maintain such insurance up to the date of closing, *Id.*, ¶ 9(h), at p. 13, but never once requires that obligation or those contracts to be assumed, and never once expressly requires proration of insurance premiums. Had the parties intended such a result, the language of the contractual provisions pertaining directly to the existing policies of insurance should have manifested that intent. In the absence of such language, such an obligation cannot be imposed.

We, therefore, conclude that the Agreement does not require the proration of insurance premiums as of the date of closing, or the assumption by NASCO of the existing policies.

E. *Escrow of Purchase Price:*

The recorded security instruments claimed by intervenor may constitute a cloud on the title of properties and assets to be sold.

The pendency of the appeals filed herein by Chambers, CTR, and Mabel Christine Baker, as well as Mr. Baker's adverse claim to the immovable purchased assets, constitute an obvious and substantial cloud on the title to the properties covered by the Agreement. The defendants, therefore, are unable now, and will remain unable during the pendency of those appeals, to fulfill their express contractual obligation to deliver "full, absolute, marketable and insurable title" to NASCO at closing. *See e.g.*, Purchase Agreement, ¶ 9(e), at pp. 11-12.

At closing, the purchased assets shall be delivered to NASCO in full compliance with the terms of the Agreement. Because the defendants are unable to deliver clear title to those assets until such time as the pending appeals are disposed of, NASCO shall pay the $18 million purchase price into the Registry of the Court, to be placed in the highest interest bearing account available, and there to be held until such time as the temporary cloud on title represented by the pending appeals is removed. Upon the final resolution of those appeals, the purchase price, with accrued interest, and less and except those credits ordered by the Court, shall be disbursed to the appropriate party, after due notice, motion and hearing.

F. *Extension of Deadlines:*

Prior to the filing of plaintiff's Motion for Judicial Assistance, there was apparently substantial agreement on



the meaning of the deadline-termination provisions in the Agreement. Under the present set of circumstances and for reasons already outlined in our Opinion of August 1, 1986, we feel that this is a superfluous issue which need not be addressed by the Court.

Borrowing from Findings (3) through (6) of that Opinion, the Purchase Agreement of August 9, 1983 provided that time was of the essence. Practically all of the delay to this date was generated by defendants' failure and refusal to perform a contract which they long ago admitted was legal, binding and enforceable and which they alone breached. Judgment in favor of the plaintiff was entered finally on December 2, 1985 and a joint application for the transfer of the license was filed thereafter. Plaintiff proceeded to take and complete their final inventory of the properties of KPLC-TV in April of 1986 but further progress toward completion of the sale was prevented because two of the principal officers of CTR had filed with the FCC opposition to the transfer of the license. Such action by employees of CTR were specifically enjoined by the judgment of this Court. Plaintiff brought contempt proceeding against each of these officer-employees and at a special status conference in May 1986 were persuaded by this Court to abandon this pursuit of these charges if the two officer-employees would withdraw their opposition. We were motivated in this action, not by any doubt of the guilt of the officer-employees, but a desire, shared by the plaintiff, to accelerate the completion of the sale. Thereafter the attention of the parties turned again to preparations for the final sale of the station properties. Meetings were held, including meetings at the offices of Jonathan Golden, defendants'attorney in Atlanta who had been concerned principally with the drafting of the Purchase Agreement. At these meeting disputes developed regarding the property to be conveyed and plaintiff discovered for the first time the existence of the bogus leases which have been discussed in detail above. Significantly, it was plaintiff who brought and filed the Motion for Judicial Assistance which

is the subject of this Opinion. Certainly defendants had no interest in resolving these disputes or completing the sale. They and some of their attorneys in this proceeding have not hesitated to use any devious and underhanded tactic available to defeat the performance of this contract. The latest of these occurred when CTR, on the advise of Mr. Edwin McCabe, its attorney at this hearing, and while this hearing was in progress, removed a substantial number of disputed items of equipment from use by KPLC-TV, knowing that plaintiff's claim is predicated on the theory that those items were being used and would continue to be used until date of closing as replacements for other operating equipment. This move was calculated and deliberate and was done slyly and surreptitiously without notice to opposing counsel or to this Court.[3]

We have before us the question of what properties are to be conveyed under the Purchase Agreement and defendants' obligation to transfer cannot be satisfied until that issue is determined. Put another way, plaintiff cannot be required to pay the $18 million purchase price as long as there is a substantial and undertermined issue of what property that sale should cover.

Under the circumstances of this proceeding, the timing and termination provisions are irrelevant. Neither party can perform by proffering to the other a performance based on his interpretation of the contract. That is the question now before the Court. That is the reason why we have reserved jurisdiction.

Since the timing issue resulted principally, if not exclusively, from the oppositions filed by the executive officer-employees of CTR and by the almost three-year delay, which intensified and increased the problem of "consumed and depleted" equipment and allowed defendants to embark on such tactics as the bogus lease performance; since the issues placed before the Court in the Motion for Judicial Assistance must be resolved before a valid and legal sale can be consummated and payment in cash



consideration required; since the timing and termination provisions of the Purchase Agreement under these circumstances are not adequate or appropriate and cannot be met by any of the parties; and since we have reserved jurisdiction for the purpose of monitoring the performance of the Purchase Agreement and issuing orders necessary and appropriate to implement the performance of the Purchase Agreement and our judgment entered December 2, 1985; we find in equity, and notwithstanding any contractual provisions to the contrary, that the August 9, 1983 Purchase Agreement shall not be terminated by defendants for any reasons related to delays incurred in obtaining final FCC approval of the license transfer application or the application for such transfer. We further find that the contractual deadlines for the fulfillment of the parties' obligations pursuant to Paragraph 16 of the Agreement shall be extended for a period of six months from this date and that closing of the sale of KPLC-TV shall take place on August 26, 1986, in Lake Charles, Louisiana, at 10::00 A.M., at a place that is mutually convenient to the parties, and that the parties shall preclose the said transaction on August 25, 1986 in Lake Charles, Louisiana at a meeting to commence at 10:00 A.M. at a mutually convenient place.

## CONCLUSION

The relief sought in NASCO's Motion for Judicial Assistance and/or Supervision is GRANTED. The relief, as determined in this Opinion, is necessary to achieve the intention of the parties as embodied in the August 9, 1983 Purchase Agreement, and to implement and effectuate the final judgment of this Court ordering the specific enforcement of that Agreement.

In light of the foregoing, we will order the closing of the sale of KPLC-TV to take place on August 26, 1986, in Lake Charles, Louisiana, at 10:00 A.M., at a place that is mutually convenient to the parties. In addition, the Court will order that the parties preclose the transaction on August 25, 1986, in Lake Charles, Louisiana, at 10:00

A.M., at a mutually convenient place.

DONE AND SIGNED at Alexandria, Louisiana, the 7th day of August, 1986.

/s/ Nauman S. Scott
UNITED STATES DISTRICT JUDGE

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[1] The defendants concede that NASCO is entitled to receive the music and music rights owned by or licensed to the station.

[2] There are four volumes of hearing transcript. In citing to the transcript, counsel has designated the transcript of July 16, 1986 as volume one (cited as "1 Tr. __"); the first transcript of July 21, 1986 as volume two (cited as "2 Tr. __"); the continuation transcript of July 21, 1986 as volume three (cited as "3 Tr. __"); and the transcript of July 22, 1986 as volume four (cited as "4 Tr. __").

[3] Plaintiffs discovered this action and reported it to the Court sometimes after hearing was resumed on July 21 and July 22. Mr. McCabe's explanation to the Court was that the defendants wanted to demonstrate that KPLC-TV could be operated with the original equipment and would still receive public acceptance when so operated. There is nothing wrong with that purpose. As any experienced attorney or a judge is aware, Mr. McCabe would have achieved much more credibility if he had given notice to opposing counsel and the Court. It is particularly true in this case when the Court, at the beginning of this hearing on July 16, 1986 and in open court, discussed with Mr. McCabe, as new counsel, the type of tactics which have been utilized in this case in the past. Our patience has been taxed too long.



IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
LAKE CHARLES DIVISION

NASCO, INC.

-vs- : CIVIL ACTION NO. 83:2564

CALCASIEU TELEVISION AND RADIO, INC., G. RUSSELL CHAMBERS AND MABEL CHRISTINE BAKER, TRUSTEE FOR THE FACILITY TRUST

---

## O R D E R

This matter came on for hearing on the Motion for judicial Assistance and/or Supervision filed by the plaintiff, NASCO, INC. The motion, the opposition, all evidence and stipulations and arguments of counsel having been considered, the law and evidence being in favor thereof, and in accordance with our written Opinion of this date, which is incorporated by reference herein; it is:

ORDERED, ADJUDGED AND DECREED that all tangible assets and equipment currently being used in the direct business and operation of television station KPLC-TV as of the date of closing, including all such tangible assets and equipment described in the April 1988 inventory exhibits (Exhibits P-30, P-31 and P-32), and including also those assets and that equipment acquired after August 9, 1983, as well as those assets and that equipment covered by the seventeen "lease agreements;; filed of record in this proceeding, and less and except those items excluded with plaintiff's acquiescence, as described in our Opinion, shall be conveyed to NASCO at closing for the originally designated purchase price of $18 million and that

Exhibit B of the August 9, 1983 Purchase Agreement shall be updated and revised in accordance with Exhibits P-30, P-31 and P-32 above referred to. It is:

FURTHER ORDERED, ADJUDGED AND DECREED that the two transmission towers included in the purchase assets are in the state of normal repair and operating efficiency except for the guy wires in the Jefferson Davis Parish tower as described in our Opinion of this date which is made a part hereof by reference, and the repair and maintenance work required for this purpose shall be undertaken at defendants' expense. To accomplish that end, bids will be sought by plaintiff from no less than three qualified bidders, in accordance with specifications provided by the plaintiff. If inspection is required by the bidding entities, the defendants shall allow those entities to inspect the towers upon reasonable notice. The lowest bid shall be accepted and the costs of the repairs shall be paid by the defendants by means of an appropriate credit against the purchase price. It is:

FURTHER ORDERED, ADJUDGED AND DECREED that the intangible assets to be conveyed to NASCO pursuant to the terms and provisions of the Agreement shall include the telephone numbers currently allocated to KPLC-TV, the post office box currently allocated to KPLC-TV, CTR's state unemployment tax rate, and all music and music rights owned by or licensed to KPLC-TV. It is:

FURTHER ORDERED, ADJUDGED AND DECREED that existing contracts of insurance purchased by the defendants to cover the purchased assets shall not be prorated between the parties at closing and plaintiff is not obligated to continue coverage of those insurance policies. It is:

FURTHER ORDERED, ADJUDGED AND DECREED that the closing shall take place at a time and place as herein set forth and that defendants shall deliver



to NASCO at closing full possession and control of all the purchased assets as described herein, and the $18 million purchase price shall be paid by NASCO into the Registry of the Court to be placed in the highest available interest bearing account. Those funds will be disbursed, with interest, and subject to such credits as appropriate, to the appropriate party, after due notice, with motion and hearing at such time as all clouds on the title to the purchased assets have been cleared, including full and final disposition of defendants' pending appeals. It is:

FURTHER ORDERED, ADJUDGED AND DECREED that, notwithstanding any contractual provisions to the contrary, the August 9, 1983 Purchase Agreement shall not be terminable by defendants for any reasons related to the time set forth therein, and that the contractual deadlines for fulfillment of the parties' obligations pursuant to Paragraph 16 of the Agreement shall be extended for a period of six months from this date, subject to the further orders of this Court. It is:

FURTHER ORDERED AND DECREED that the closing of the sale of KPLC-TV shall take place on August 26, 1986, in Lake Charles, Louisiana, at 10:00 A.M., at a place that is mutually convenient to the parties, and that the parties shall preclose the transaction on August 25, 1986, in Lake Charles, Louisiana, at a meeting to commence at 10:00 A.M. at a mutually convenient place.

Alexandria, Louisiana, this 7th day of August, 1986.

/s/ Nauman S. Scott

UNITED STATES DISTRICT JUDGE

(2)

# NO. 90-256

## In the Supreme Court of the United States

OCTOBER TERM, 1990

G. RUSSELL CHAMBERS
Petitioner,

v.

NASCO, INC.
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

**JOINT APPENDIX**
**VOLUME II**

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PETITION FOR CERTIORARI FILED AUGUST 2, 1990
CERTIORARI GRANTED OCTOBER 1, 1990

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## VOLUME II

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
ALEXANDRIA DIVISION

FILED APR 2 1988

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| NASCO, INC.<br><br>Plaintiff, | : | |
| VS | : | CV NC. 83,2564 |
| CALCASIEU TELEVISION & RADIO, INC.<br><br>Defendants. | : | |

TRANSCRIPT OF PROCEEDINGS had on the 11th day of April, 1988, before His Honor Senior Judge Nauman S. Scott, at the United States Federal Building, 515 Murray Street, Alexandria, Louisiana.

Reported by:
Nina J. White, Official
Court Reporter.

* * * * * * * * * * *



[R. 144]
EXAMINATION BY
MR. TRITICO:

Q For the record, sir, would you state your name and address?

A Russell Chambers, 27 Timberly Drive, Lake Charles, Louisiana.

Q. Mr. Chambers, would you explain to the Court the inception of your first contact with any attorneys regarding your attempts to withdraw from the contract which you had previously signed to transfer the assets of the television station to Nasco?

A I think it was around the latter part of August, 1983.

Q And what prompted you to decide to withdraw from this contract?

A There were many things. All that came up over a short period of time.

MR. SCOFIELD: Your Honor, at this time I want to make an objection that may be general. I hope it is. As to any testimony as to the reason for sale and Mabel Baker as trustee and lease back. I think that Your Honor has found that a finding of fact that has been made a part of Your Honor's ruling on the merits in this case as adopted by the 5th Circuit Court of Appeal. The reasons for this sale and lease back scheme and that it was solely for the purpose of placing these properties beyond the reach of this Court and beyond the reach of Nasco for purposes of seeking specific performance. And Your Honor's ruling of November 8, 1985. This finding is made no less than four times. I would object to any testimony that varies with the findings of fact and conclusions of law previously entered by this Court.

MR. TRITICO: Your Honor, I don't intend to rehash the matters that have been decided by this Court. I simply am setting a foundation for the state of his mind when he went to see the attorneys. To get to that point I could start

off by saying when did you first see the attorneys and what was your dealings with them. That's what I intend to get into and not this other business.

THE COURT: All right, sir, overruled.

THE WITNESS: There were certain things that happened during that short period between around August 20, 1983 and the following 10 days that made me have second thoughts about trying to go through with the contract that I had signed on August 9. And I contacted my attorneys and discussed it with them.

BY MR. TRITICO:

Q Now, I will, with the Court's indulgence, lead him to a point where we can get to substantive matters. I'll attempt to do that without creating problems for anybody. You were being represented by Mr. John Golden in the initial stage of drafting the contract, et cetera, with regard to the sale of the station; is that correct?

A No, that's not exactly right. I had two law firms that represented me. One was the Camp, Carmouche firm which I had hired first in 1971 and they had continued to represent me for the previous 12 years to 1983. And then I had been working with the Arnold Golden and Gregory firm in Atlanta for perhaps a longer period of time, maybe 15 years and I relied on the expertise of the different firms for different reasons. I also used a law firm in Washington which was Cohen and Marks which I had worked with for some thirty years on FCC matters so I guess in summary, I could say that I used three law firms depending on the expertise of each one for different types of things.

Q But getting specifically to the Nasco transaction, Mr. Golden was the one who participated in drafting the agreements that ultimately resulted in purchase contract being signed.

A Yes.

Q All right. At some point thereafter for reasons that you



felt were justified, you decided to seek further advice as to whether or not there were any legal means for you to escape from this contract; is that correct?

A I would characterize it as knowing that any contractual discussions would be local in nature so that I approached my local law firm, Camp, Carmouche.

Q And what dealings, what initial dealings did you have with them and with whom with regards to your Nasco contract?

A My relationship at that time was with Mr. Edwin Hunter who was my understanding head of the law firm. Prior to that time, it had been with John Camp before he moved to Washington and so my initial contact about it was with Edwin Hunter.

Q And what developed with regards to the further handling of this matter once you had indicated to Mr. Hunter your concerns about the contract?

A He assigned me to Jack Gray as the firm's top attorney in litigation.

Q Now, had you had Mr. Gray representing you on prior occasions other than this, to your knowledge?

A Not me specifically, no.

Q So you were in effect putting it in the hands of Jack Gray to handle whatever matters came up with regards to the Nasco contract?

A Yes, and he was new to me.

Q Now, what is it that you told or what is it that you asked Mr. Gray to do or to advise you on initially?

A I provided him a copy of the sales contract with Nasco. I described also the relationship that I had with John Golden who had prepared the contract. And he didn't have a copy of that sales agreement the first time I talked to him and I think we sent one over to his office and at that point I turned the case over to him.

Q Now, what was the advice that you received from the

firm that Mr. Hunter you say was the head of at that time. What was the advice that they gave you as to what you could do or might do with regards to avoiding this sale initially?

A Well, I think what I did first is wait until they had studied the contract and I went over all the reasons why I had changed my mind on going through with the sale of the station and then I sat down with them after that time to review the reasons why I legally shouldn't go through with the contract.

Q Did you ever suggest initially to your lawyers that you wanted them to get you out of this contract regardless of what the outcome would be to you? And for them to use any means devious or otherwise to cause you to be relieved of it?

A Well, I certainly didn't discuss any devious means. I did discuss the fact that I had made a mistake in signing the agreement, that I didn't realize the kind of people that I was dealing with, and I didn't want to have any further relationship with them. I was willing to pay any expenses and I wanted out of it and I was willing to take my lumps by paying them off to get out of the contract and that if they didn't accept it, that I wanted to follow through on any legal means that I could to get our of the contract.

Q Were you given to believe that there were any legal means that they could utilize in an effort to relieve you from the contract?

A Well, we discussed all of the legal means that we could think of.

I know my position was that if we had a jury trial and I relayed my reasons to reasonable people as to why I wanted out of the contract, I did not think there would be any question that a jury would not make me go through with that contract and one of my first requests to Mr. Gray and I repeated it many times thereafter, I want a trial by jury and I was assured that I would have a trial by jury by Mr. Gray. And we continually talked about the various



legal approaches. To how we would defeat that contract. At some time subsequent to the first meeting, I was approached by Mr. Gray and I was told about a method where if the contract had not been recorded that under Louisiana law like no other state law, that I could get out of that contract with no problem.

Q Now, this was Mr. Gray giving you that advice?

A Yes.

Q All right?

A And this was approximately a month before October, the famous October 17 date. And I'm a businessman, not a lawyer, and I don't have any legal training and I couldn't believe that there was a law that would permit something like that. And I struggled with that for maybe two or three weeks but not intentionally delaying because I had gone to Europe, between hearing about that, on business. I had been back and forth to the west coast two or three times and it was only brought to a head sometime between the 10th and 14th of October but the incident about the method to defeat the contract as the number one choice came up approximately a month before October 17.

Q Did Mr. Gray at that time give you any reason to suspect that if you followed this method or if that was the method it relied upon that if it failed that not only would you lose the station and have to go through the contract and pay damages but that there were other remedies that the Court might have available to punish you and/or the lawyers in the way of sanctions or even contempt?

A I didn't know anything about sanctions. I have never been held in contempt before though I have been in Court a few times.

Q But other than this proceeding?

A Except in this proceeding and I didn't have — weren't told any of those things that might happen.

Q What happened after you returned? You said you struggled with that several weeks. What was your next

encounter with the law firm with regard to the machinations that were to follow?

A I returned from a trip and during the week prior to Friday, October 14, there were conversations back and forth between John Golden and myself and it seems that Nasco for whatever reason zeroed in on John Golden and John was trying to arrange a settlement on this contract. I owe him money and he stood to get his money if this contract went through. And Nasco did all of their negotiations not with me but with John Golden and in Atlanta and I was not familiar with all of it and I did not participate in very much of it either. And on Friday, October the 14th, around 5:00 o'clock central time, John Golden called me in Freeport, Texas. And I had just left the office to return to Lake Charles. He then called my office at Lake Charles because he thought maybe I had had time to get there, and he left word that he had called but he didn't leave word that he was going to call back and he didn't ask that I call him. And that night there was a black tie dinner for Bill Lawton at the Calcasieu Marine Bank building and I attended that and I attempted to call John Golden in Atlanta because he had called and my wife had told me that he had called. And I got no answer from his home. Shall I go on as to what happened?

Q Yes?

A The following morming I met with Edwin Hunter and Jack Gray at their offices.

Q That would be the 15th?

A That would be the 15th.

Q All right?

A And we decided that something was going on and we knew beforehand that probably there was going to be a lawsuit filed.

Q How do you — what do you mean you knew beforehand?

A Well, I knew during the week before the 14th that Nasco would probably file a lawsuit to enforce the contract from



my conversations with John Golden.

Now, how he arrived at that, I assumed it was conversations with Nasco. Because he was encouraging me to go ahead and close this contract.

But he was not familiar with my reasons for not wanting to and his reasons for closing it was financial. and then I think he hates controversy which is in his favor. I think that's also a reason why John Golden would favor that. He's a peacemaker and a good one I might add. And so John Golden had prepared about a year before a trust for me and my children and I still have that someplace in my records but we never did follow through on it but I had also followed up with Edwin Hunter about a trust so this was a continuation of the discussions that we had had a month earlier and it was decided that it was imminent that something was going to be filed bay Nasco so that we should form that trust and follow through on the method to defeat the contract as the best method that Gray had come up with.

Q Now again the meeting on the morning of the 15th, and the discussion of the trust, was this something — which one of the attorneys that advised you and was leading the way with regards to using that method as a means to defeat the contract.

MR. TORIAN: May it please the Court, may I have a clarification of the question with the Court's permission as to whether that method is meaning the public records doctrine or meaning a setting up of the trust. I was unclear of the method he referred to.

MR. TRITICO: Combination of the two.

MR. TORIAN: Under the circumstances, Your Honor, may I espectfully ask he not have a combination question if that's possible.

THE COURT: All right. If you would rephrase

the question.

BY MR. TRITICO:

Q All right, who at that point in time, which of the attorneys that you had been dealing with with the firm, with the Carmouche, Camp firm had advised you and were going to go forward with the defense based on the Public records doctrine?

A Well, Edwin Hunter had assigned me to Jack Gray and Edwin Hunter doesn't do much detail work that I'm familiar with. And I was working solely with Jack Gray on the details of what I was doing.

Q And was there any other attorney in that firm with you on the morniong of the 15th other than Mr. Gray?

A There were other attorneys in the office that were working in various phases of getting the work done. The detail work, and I frankly couldn't say who they are now and I didn't know them at the time.

Q All right. the plan to form the trust in furtherance of this utilizing of the public records doctrine how did that come about on that particular morning?

A Well, on that particular morning as it had been explained to me several weeks earlier, the details of what were necessary to have happen in order to take advantage of this unusual approach in Louisiana was that you had to do something with the assets of Calcasieu TV and Radio and as I recall there was more than one mentioned. It was decided by the firm that the best option was to use a trust. I had previously discussed a trust and I recall that I was asked who would be the trustee and that had come up before and my sister who is my only living close relative was the one we discussed before and was the one that we discussed that day and it was decided that we would go ahead because I had previously discussed with her if she would be a trustee, not of this trust but of a trust for my children and everything we did on Saturday and Sunday then was simply carrying out what the attorneys decided



was necessary to do in order to get all of the legal work done.

Q Now, was there any conversation in your presence with any of the attorneys in the firm as to the urgency to have it done then and as soon as possible before Monday?

A There wasn't any discussion that Monday had any significant date until — and I'm not sure whether I brought it up or my wife brought it up that John Golden had attempted to get in touch with me the day before. As a result of that, no one knew what had been said to John Golden. and Mr. Gray then and I don't know whether I suggested he talk to John Golden but he went in the other room and placed a call to John Golden and I have no knowledge of what John Golden said to him or what he said to John Golden but we had simply planned to get through with the work on Saturday and Sunday because I had a very busy, urgent schedule for the following week and I was supposed to be in Canada on Monday or Tuesday. A Tuesday, I guess it was, and we worked on the weekend mainly to get the work out of the way so I could go on my schedule.

Q When was the first time after the morning of the 15th that you ever heard the term temporary restraining order or a TRO mentioned.

A Well, I believe I heard it on Monday or Tuesday but I had no knowledge of what a TRO is and frankly I still have to take my fingers and say temporary restraining order, TRO, to remember it now.

I did not understand or have any familiarity with TRO.

Q So that on Saturday morning and even on Sunday you had not been told by either of the attorneys that something was going to happen Monday and that you had to get this done and filed before a specific date?

A No.

MR. SCOFIELD: Excuse me, Your Honor, my objection is general to this line of questions. I attempted to make it general.

THE COURT: Yes, I think you did.

MR. SCOFIELD: That is variance with findings of fact and conclusions of law of this Court. I will object to it.

THE COURT: I think you made that understanding with your objection.

BY MR. TRITICO:

Q I lost my question.

Do you recall the question?

A No.

Q I think he answered the question but I forgot what it was.

A I had an answer in mind if that was the question. I would like to —

Q I'll go over it again. Had you been told anything on the morning of the 15th or even on Sunday of the need for any urgency to get things done before Monday or by Monday?

A No.

Q Did you come up with the scheme as the term has been used in this lawsuit over and over again, did you come up with the scheme to transfer the assets out or was it on the advice of some attorneys and if so, which?

A I didn't come up with the method. I didn't understand it and at first I didn't believe it was legally possible. Obviously it wasn't legally possible so I feel justified in my earlier position but I did not come up with anything relative to that.

Q Okay. When was the next time after that morning that you had any further contact with the law firm and if so, with whom and for what purpose? After the morning of the 15th?

Well, it would have been the 16th because I went to the office to complete signing the papers that were worked on on



the 15th and maybe the night of the 15th. I don't know that. But they were worked on during the day on the 15th and I signed them sometime after lunch, I believe, on the 16th which was Sunday afternoon.

Q And who was present in addition to you and perhaps your wife and I'm speaking specifically of the attorneys.

A There were attorneys from the Camp, Carmouche firm that prepared the papers and Mr. Gray, of course. And I don't recall who those attorneys were.

Q Now, was it Mr. Gray or was it Mr. Hunter that decided that in order to utilize the public records doctrine that that there had to be a transfer of the assets out to some other entity?

A Mr. Gray.

Q So you signed instruments on Sunday then what did you do on Monday?

A On Monday morning I attended the opening of the Calcasieu Marine Bank. About 11:00 o'clock as I recall I had planned to go to Birmingham after the opening of the Calcasieu Marine Bank to get my sister to sign the acceptance of the deed or the acceptance of the trust, and I had a little time on my hands because the plane in Angleton had to be refueled and I think it had been on another trip but I was waiting on the plane to come to Lake Charles and they went shopping and then when the plane arrived in Lake Charles, I flew to Birmingham, signed the papers that I had to sign there and got my sister to sign them and returned.

Q Now, when you returned were you told anything about any temporary restraining orders or any legal maneuvers that had taken place on the Monday by your attorneys?

A No.

Q When was the first time that you heard anything about temporary restraining orders?

A Well, if I may expand on that, I didn't really understand temporary restraining orders but I did understand that

when you had a lawsuit like this, that the chances were that there would be some kind of control or restraint on the operation of the station and I discussed this with John Golden previous to October 14 that something like that might occur if we got into a lawsuit but having been in some types of these situations before or seen them regarding other companies, what I thought that Nasco if they understood the problems would want is to make sure that the value of the property that they were buying did not deteriorate, that they were proposing to pay $18 million dollars for it and they would want to be sure that it was worth $18 million dollars at the time that you would have a closing if one occurred or I would have to pay the difference as damages if the station decreased in value so my conversations with Golden pertained to doing what I could to maintain the value of the station if we got in the lawsuit so in my own mind's eye, I was thinking that a restraining order or instructions from the Court or whatever you would call them would be that you better not let that property deteriorate and that was my whole thrust for three years was to make sure that the property improved as an operation so that if the Court eventually ruled it had to be turned over, that it would not be of less value than $18 million dollars.

Q And if it was of less value what did it mean to you?

A If it was less value it meant I would have to be responsible for that as a damage figure for the lesser value of the station.

Q Were you ever told initially in the early stages, I'm talking about October 15 to 24, the period of time that if a restraining order was issued that before it would be effective it actually had to be physically put in somebody's hands?

A Yes, I was told that.

Q What were you told and by whom?

A I was told by Mr. Gray that there was no legal effect on anything that was filed until he had that in his hand and



until he got a chance to respond to it and then the Court would act on his response and the initial requests by the other parties.

Q When was the first time that you were aware that there had been some contact on Monday, October 17, 1983 between Mr. Gray and this Court concerning the issuance of the temporary restraining order?

A I think at the Calcasieu Marine affair. I ran into Jack Gray who also attended that and he mentioned that he had talked to Judge Scott.

Q And did he tell you anything of the substance of that call?

A No, just that he talked to Judge Scott and that there was things going on about a restraining order.

Q All right, did he know that you were planning on that day or about that day to go and get documents completed that had been drafted up over the weekend?

A Yes.

Q Did he tell you not to do it?

A No.

Q Did he tell you that if you did that, that you would be violating some order of the Court?

A No.

Q When was the first time that you learned that actually of the actual facts of the order being signed on that Monday?

A Well, I don't know that I can answer that. I left on a trip and I was always late in finding out these things. For example, in the question of the time that I left to go to Birmingham and the time I got back, I didn't realize that neither the Court nor the lawyers for Russell Chambers not the lawyers for Nasco understood what Zulu time meant and they were having long legal arguments about what time I got back and what time I left and I didn't even know about that until I overheard an argument about it

that I came back about midnight and like many other things, I did not hear about it until after the facts and I did not hear about the conversations with Judge Scott until much later on.

Q Did your attorney Mr. Gray advise you that he had discussed with the Judge the wording of a temporary restraining orders and whether or not he had told the Judge what was going on. Did he tell you anything that conversation?

A Well, at some point in time we discussed it but not right away.

Q Did he — when did he finally if ever tell you that you had — you might be in violation and that all of you might be in violation of that temporary restraining order by having carried out this maneuver to transfer the assets?

A Never did tell me that.

Q Following that, there were some instruments drawn up with regards to the leasing of the lease back of the equipment?

On whose advice were these done?

A You mean the lease back of the equipment that —

Q That had been transferred in the trust?

A That was done on the advice of Gray on the Saturday and Sunday, the 15th and 16th.

Q Now, when you say on the advice of Gray, was Mr. Hunter, Edwin Hunter also present during these discussions?

A He was present at some time but initially even before the 14th, it was decided that here are the things that should be done in connection with this approach. And I don't recall that anything other than going ahead and getting them done was discussed on the 15th and 16th. Different people had different assignment. I simply got the papers and signed them.

Q The next specification that I will address as listed by



counsel for Nasco have to do with the refusal to comply with the Court's order. That Nasco be permitted access to the books and records of CTR. Now, you have already been held in contempt of Court and fined by this Court as a result of that and I'm not getting into that. What I want to get into is whether or not you had the advice of counsel in your refusal to give them the additional materials that they claimed and the Court later found was contemptible?

A I had the advice from two attorneys as to what to do in that case. One was Jack Gray and the other was John Golden. And I guess you could say a third one because a third attorney followed the instructions of John Golden. I discussed with them what I was supposed to do. Clearly the contract said that I was obligated to do certain things in connection with the assets which I had agreed to sell to Nasco. And since John Golden took another contract and copied it, and adopted a lot of the language in it but was greatly modified by Nasco, they made it apply to Tennessee law, they included a number of the important things apparently changed with John Golden without a great deal of discussion with me. I didn't even know about the Tennessee law until after I had signed the contract and they assured me that it was all in order.

But because John Golden had written a contract, I called John and I said Nasco has asked to see material in no way related to the assets that I agreed to sell and am I obligated to let them see that information. And I says frankly I have been in numerous sales and I have never heard of anybody coming in and looking at this material before the FCC approval and they had made a mistake in the contract which John Golden acknowledged that they had made a mistake and he said that no, I'm not obligated to show them those things and I believe I read to him the Court order and the language of it and he also reflected on that and still agreed with it and I said will you confirm that in writing to me and he did that through another attorney who worked for him, Clint Richardson, and that letter was dated December 1. I mean, November 1, 1983, except that letter had three mistakes in it. But it did say clearly

that I was not obligated and he had written the contract pertaining to those features. Then I asked Jack Gray about it and Jack, of course, was concerned about pleasing Judge Scott but he said it was his opinion that I did not have to show any of the material. Now I know that Nasco was working there and they were supposed to work through a given Sunday and I don't know the date offhand but I could get it, and I came back early on a Friday at noon to specifically go to Nasco and ask them if there was anything else that they desired and it turned out instead of working through Sunday, they had left as they frequently did earlier than they had claimed they needed to work by noon on that particular Friday, but they had their two contract employees from Washington there and about 2:00 o'clock I arrived and went to them and asked them if there was anything they needed and I happened to, without realizing it beforehand, worked with one of those men years before and he said no, they had seen everything that they wanted to see and I felt pretty confortable about that.

Q Mr. Gray knew what documents they wanted to see, did he not?

A Yes.

Q And he advised you that you didn't have to show it to them?

A Yes.

Q In addition to that you spoke to John Golden and he likewise advised you that you didn't have to?

A Yes.

Q I'm going to show you this copy of this letter which I have marked D-1 and ask you if that is the letter you received in confirmation of your telephone call to Mr. Golden?

A Yes, it is.

Q We have marked it as D-1, your Honor, and ask that it be filed on behalf of Chambers. I have already exhibited it to counsel.

THE COURT: Admitted.



MR. SCOFIELD: Just for the record, Your Honor, I would object to the relevancy of Mr. Richardson's letter. It's dated November 1, 1983, and the ruling of this Court recognized that I made the request for the documents on November 25, 1983 some three weeks or more after this letter. So it couldn't have been in response to something I had requested.

THE COURT: Couldn't have been in response to what, sir?

MR. SCOFIELD: Well, he's saying –

THE COURT: Oh, I see.

MR. SCOFIELD: This letter was written to give him advice on how to respond to my request.

THE COURT: Yes.

MR. SCOFIELD: This letter comes 24 days before my request was made.

MR. TRITICO: Your Honor, I was not involved in the litigation at that point. All I can say is what Mr. Chambers perhaps there have been discussions about what they intended to look at. Maybe the formal request wasn't made. The point is he was advised by his counsel in Lake Charles he didn't have to show it to them. That's his testimony. Perhaps Mr. Gray will disagree with that but I don't think he will because it's in his response he did advise him that.

THE COURT: Well, I'll overrule the objection. That could be argumentative in spite of the fact it's been admitted.

BY MR. TRITICO:

Q Before I overlook this, Mr. Chambers, were you ever informed by your counsel in Lake Charles, Mr. Gray, at some point in the proceedings that the conversation that he had with Judge Scott that it had been taped?

THE COURT: What?

BY MR. TRITICO:

Q That the conversation that took place on October 17 had

been taped with Judge Scott?

A I believe there was a reference to it at some time. I don't remember.

Q Did you ever see that transcript until most recently?

A I did not read it until recently, no.

MR. TRITICO: We offer in evidence, Your Honor, copy of the transcript of telephone conversation dated October 17, 1983, or actually several conversations. The transcript was retrieved from the records of the 14th Judicial District Court, in the matter entitled G. Russell Chambers versus A. J. Gray, the III, et cetera. And it's in the memorandum, the purpose being to show that counsel for Chambers was dealing with the Court in a way that created a problem and that Mr. Chambers was never made aware of the exact nature of that conversation until most recently.

THE COURT: All right. Without objections I'll admit it.

MR. HOSKINS: What is the number on that?

MR. TRITCO: D-2. I guess I better call it Chambers 2.

We will change those exhibits to Chambers 1 also.

THE COURT: That will apply to 1 also.

BY MR. TRITCO:

Q Now, Mr. Chambers, if Mr. Gray had advised you with regards to the request for production that you should give it to them despite what he told you, if he had told you you needed to give it to them, would you have complied with your attorney's suggestion?

A Yes.

Q The next specification has to so with the filing of appeals with regards to the contempt judgment.

I presume that it's not necessary for me to ask you if you were unhappy about the decision to find you in contempt of Court?



A Yes, I was.

Q Did you discuss with your attorneys whether or not there was any relief that you could get by way of appeal?

A We thought the decision was unfair, and we thought that we should appeal it because we didn't think it was fair.

Q Did your attorney or attorneys at that time suggest to you that you should appeal and that there was merit to the appeal?

A Yes, they thought that we should appeal and they recommended it.

Q When we say they, which attorneys are we talking about?

A I'm always talking about Jack Gray in connection with the Nasco versus Calcasieu TV and Radio, Inc.

Q Did they ever advise you with regards to that appeal that it was meritless, that it was untimely or that it would be sanctionable?

A On the contrary, we thought it would be reversed.

Q And that is the advice that your attorney, Jack Gray, gave you?

A Yes.

Q Had he told you it was meritless that it would be untimely, that it would be frivolous and that it would open you to possible sanctions, would you have suggested that he go forward with it under those conditions?

A No, I wouldn't.

I would like to add though that most attorneys including Mr. Gray always say you don't know what is going to happen when you are in Court.

Q Well, I'll go along with that but you were not advised that it would be better not to take the appeal?

A No, we thought we would get relief in the appeal.

Q Did Mr. Gray ever at that point regarding that appeal tell you I don't think we should appeal but you thought we

should and you said I'll insist that you appeal?

A I take the suggestions of my attorneys. I do not overrule them on legal matters and that was a legal matter.

Q All right. The pleadings that were filed that the motion for sanctions under number six claims that there were numerous meritless pleadings filed that were not well grounded in law or in fact and were filed for the improper purpose of delay and needlessly increasing the cost of this litigation. Who orchestrated the filing of pleadings in this litigation? Was it you or was it your attorneys who made the ultimate decision of what was to be filed, what it would say and when it would be filed?

A I would like to comment first on one statement that you made. Nothing was ever filed in this case for purposes of delay to my knowledge. My life's work was involved here, $18 million dollars was involved here and everything that I know of that was done was done and decided on by the attorneys for the purpose of trying to win this case which they were always optimistic that we would win and they made the decisions on what we did to try to win this case.

Q Did you ever go in to Mr. Gray's office with a prepared motion or pleadings that you wanted him to copy and file for you?

A Never.

Q Did you always see the pleadings before they were filed?

A No. In fact, I complained about not seeing some of them.

Q Were you ever advised by Mr. Gray that you know, Mr. Chambers, we are filing a lot of pleadings here and some will be found perhaps meritless and it's going to cause you some troubles down the line during this litigation, after this litigation or during the litigation? Did they ever warn you about anything like that?

A Never even a suggestion of that.

Q Now, number 7 says October 24, 1984, that you all filed an amended answer and frivolous counter claim alleging that Nasco had breached the contract. I presume you



discussed with Mr. Gray your reasons for thinking they had breached the contract or was it he who decided there were some reasons that they had breached the contract?

A I discussed the facts about what happened and he decided whether those were facts that breached the contract or not.

Q All right. The decision to file the amended answer with a counter claim alleging that Nasco had breached the contract, did you draft that pleading?

A No and I'm not sure that I even approved doing that.

Q You were still relying on the integrity knowledge and advice of Mr. Gray in the handling of this litigation?

A Yes.

Q Now, the next specification has to do with the scheduling of, as Nasco refers to them, numerous unnecessary depositions including all of the members of the board of directors of Nasco and their banker. Did you and Mr. Gray, I presume, discuss the need for taking the depositions of the board of directors?

A Yes, we did.

Q And whose decision was it, whose ultimate decision was made that we should depose all of its bank directors or the bank directors involved as well as the Nasco board?

A Well, Mr. Gray and I discussed the fact that we thought the Nasco people continually lied and we had taken the deposition of Mr. Brian Burns who was president of channel communications who had signed on behalf of Nasco. We suspected that they wanted to be in a position to walk away from that contract if they didn't like what they —

MR. TRITICO: If Your Honor please, I'm hearing comments that are interrupting my thoughts. I would ask counsel to restrain themselves.

THE COURT: I couldn't hear it.

MR. TRITICO: I hear it.

THE WITNESS: They were interested in what they

Mr. Gray was interested in what had happened and in taking the deposition of Mr. Burns, he had unequivocally stated that he didn't have authority to sign for Nasco but our total contract relied on his signature.

And therefore we wanted to find out if the directors of Nasco had ever given him permission to do that. It turns out that they said in a one line statement that they had done that but they had not advised Mr. Burns that he had the authority to go down to Lake Charles and sign or go to Atlanta and sign that agreement and that created the need for deposing all of those directors.

BY MR. TRITICO:

Q All right, but the point is that the decision to take their depositions to support a legal defense that Mr. Gray thought would be viable if the man didn't have authority was the decision made by Mr. Gray?

A Yes.

Q Would the same be true with regards to the question of whether or not the need to take the bank directors' testimony was necessary depending on whether or not they actually had a commitment for the funds?

A Yes.

Q If Mr. Gray had thought that it was unnecessary or that it was needless or that it was just going to be a harassing tactic and had told you so would you have yielded to his advice?

A I would have left the legal decision up to him.

A Now at this point having nothing to do with the Nasco response but something else as part of a response from Mr. Gray's attorneys, were you hiring or having other attorneys to monitor the actions of Mr. Gray in the handlings of this litigation as he refers to you having lawyer's including myself monitoring him during the handling of your matters with him?

A No.

Q Number 9 of the request for sanctions claims that



respondent's persistently attempted to expand the issues of the lawsuit in their terms well beyond the bounds of reason. And I will ask you again as I have on previous occasions, I apologize to the Court and counsel for having to go over perhaps some of the same material but they itemized them separately and I have to go over them, I have to take them that way. The expanding of the issues if there were any as counsel refers to them, who would conceive, prepare and file such pleadings that they may be referring to if they were, in fact, if they are, in fact, subject to sanctions, who prepared them? Who decided the language and decided when to file?

A Mr. Gray and his firm.

Q Did you ever suggest to Mr. Gray and the firm that I want you to file as much as you can in this lawsuit to harass them as much as you can, to delay this thing as long as you can by filing whatever you can to do so?

A No.

Q At any time did the attorney Mr. Gray or anyone else for that matter in the firm ever suggest to you what they were doing was frivolous or might subject you to sanctions other than the delay damages if the tactics they chose failed?

A No.

Q As a matter of fact when was the first time you heard the term used as it might apply to you, the term sanctions.

A Well, in a legal sense I had never heard of it until this litigation. I had heard of it before and it's used in business terms but not in legal terms I hadn't heard it.

Q Had you ever heard it used in the context that you might be sanctioned until this pleadings was filed most recently? I said most recently, this pleading?

A No, I did not, had no knowledge of it.

Q Did Mr. Gray ever show you a copy of some draft document prepared by some other Federal Judge as his comments on sanctionable actions against attorneys?

A No.

Q Number 10 of the specifications suggests that you were constantly seeking delays of discovery hearing dates and of the trial date itself because Mr. Chambers as they say supposedly had more important things to do. Were you aware that — I'm sorry, strike that. Did you in fact ever create a conflict in your schedule simply to create a problem for the orderly proceedings in this litigation?

A Never and on the other hand, I worked hard trying to avoid it.

Q Now at the time of this litigation you were president of a multi-national corporation, is that correct, or chairman of the board?

A I was president and chairman of the company.

Q Were there times when you schedule did create a conflict for things that were planned in this litigation?

A Yes, I had a schedule where some things could be changed but I had legal obligations that required that I attend meeting that if I was not there, I had a legal requirement to get that changed and I had other depositions in different places in the country. I had some in Europe. And I tried to move those around to accomodate this problem because those representatives of the company were — I was just one of many and this represented the most important thing in my existence.

Q Now, when you had a conflict would you present the conflict to your attorney and ask him to see if he could do something about it?

A In most cases when I got a schedule, I changed my schedule around to accommodate the Nasco Calcasieu TV problems and changed the other schedules because I was in charge of most of them. There were a few I couldn't change.

Q The point is there were a few you — some you couldn't change and did you ask you attorney to contact the other side and do something about the resolving the conflict?

A Yes, and as I recall, I didn't get one accommodation from that over the period of years.



Q Did Mr. Gray ever tell you that your failure to be able to keep your schedule clear enough to meet all the deadlines of the requirements of this Court would subject you to sanctions at some point later on in this trial?

A No.

Q Now number eleven has to do with the recusal request of Judge Scott. It's called a classic violation and that you should be sanctioned for that. Now, Mr. Chambers, I would not ask you because it's obvious that you felt that there were problems with regards to the Judge being objective in this case. You felt that good or bad or right or wrong, you felt that?

A Yes.

Q Did you discuss that with your attorney?

A Yes.

Q Did your attorney discuss his attitude or his reaction to what was going on as to whether or not there was a need to do something about it or at least attempt to do something about it?

A Yes.

Q Did your attorney tell you that I really am reluctant to file a recusal motion of a Federal Judge or any Judge?

A Yes, he did.

Q All right. I would be surprised if he wouldn't. Now did he say I'll only do this if you insist, Mr. Chambers?

A No. We thought it was justified.

Q Did Mr. Gray tell you if we file this motion and it's denied, what the effect might be either because of further antagonizing the Court or that you might be subject to sanctions for having allowed your attorney to follow that procedure?

A No. We thought Court's were used to this.

Q But the point is he never told you that you might be asked to be punished for sanctions for having allowed your attorneys to make that legal decision?

A No.

Q The next specification has to do with the denial of the motion for recusal and then the request for relief at the 5th Circuit. Did your attorneys advise you that they thought Judge Scott was in error for having failed to recuse himself?

A Yes.

Q Did they tell you that they thought that because of their legal conclusions that he was wrong, that you had a right to appeal?

A Yes.

Q Or to request relief?

A Yes.

Q And did they advise you to allow them to do so?

A Yes.

Q Did you insist that they do so despite their protestations if there were any?

A No, I think the way these things worked on this case was that they looked at the legal aspects of the case, made the suggestions and then in some cases discussed it with me and some cases, no.

Q Okay, but they didn't tell you that it would be wrong for us to try and seek relief before the higher tribunal?

A No, they didn't.

Q Was the motion for recusal in your mind and the petition for mandamus to seek the recusal of Judge Scott designed so far as you know just to add further delay to this litigation or was it for reasons that you and/or your attorneys thought were in the best interests of their defense?

A We thought the Court wasn't fully informed, had one side of the story and we did everything we did in hopes of getting better understanding of the Court.

Q The fact that there were, number 14, the fact that your attorneys listed at least a hundred witnesses in their pre-



trial order, I will ask you, did you participate at some point in going over what witnesses you might think they should have along with any suggestion they had as to what witnesses they could use or should list on this pre-trial order?

A Well, I didn't get into what they should lists on the pre-trial order but I did participate and still think about an approach of trial by jury to get the people to tell the truth about what had gone on and I certainly supplied names but I didn't insist that they be presented to the Court.

Q Did you supply these names at their request to give us names?

A Yes.

Q Did you ever prepare a pre-trial order or did you even know what a pre-trial order was?

A I didn't know what a pre-trial order was.

Q Did you counsel tell you, you know, if you list a hundred names on here and we don't use them all or the other side decides to go take depositions of them all over the country as opposed to just sending out a simple set of interrogatories to ask what they are going to testify about that if they do that and you don't use them that you are going to be subject to sanctions for doing that?

A I didn't know that.

Q Number 15 says after putting Nasco through the traces for so many months on the eve of trial your counsel stipulated that the August 9, 1983 purchase agreement was a valid and enforceable contract. Where were you on the eve of the trial that was to take place on apparently August 10, 1983.

A I was in Lake Charles. I don't know where I was.

Q All right. Did you participate in the decision made at that time that Mr. Gray, you wait until the eve of trial and then go in and stipulate that the contract is valid and enforceable?

A I didn't know what that meant.

Q But you didn't suggest that is what he do?

A No.

Q I'm not suggesting that he did it without your permission. I presume he had your authority to do so? Or did he?

A Well, I don't think he did. I think we discussed it but there was no explanation of what that meant to the lawsuit. It was a last minute, few minutes before the trial that that came up. What I had no explanation of the eventual meaning. It was my understanding that that meant that I agreed that I had signed the August 9 Agreement and that it was a valid contract speaking for itself. Beyond that, I know nothing about it and had no other explanation of it.

Q Had there been any earlier discussion whereby Mr. Gray would have suggested I think we ought to go in there and admit the contract is valid and binding and forget these defenses which we have been utilizing all these months?

A No.

Q The next is item regarding your disturbing the status quo by petitioning the FCC for permit you to construct and relocate the station facilities. Did you file a petition for construction permit to relocate the construction transmission facilities?

A No.

Q What did you file?

A I filed an application for moving the transmitting site to a location where you could expand the height of the transmitting antenna to two thousand feet.

Q Did you have the advice of anybody as to whether or not that was something that needed to be done and if so, who was the person that advised you?

A It was an experience that — conclusions from things that had happened in the Lake Charles area, and in my relationship with NBC in New York and it gets back to the status quo. Starting with the Court's order to maintain status



quo, my understanding of that meant that I had better not allow that station's value to drop and everything that I had done was directed towards doing that. And it was obvious that if Channel 7 in Lake Charles did not have NBC, that the value would not be $18 million dollars. It would be more like $10 or $12 million dollars and I would be stuck for damages because that had occurred. Well, I still was running — while I was still running the station. So my total interest in increasing the tower height was to maintain the status quo and not allow the value of the station to decrease and it came about because there was a argument going on between ABC and Channel 3 and Channel 3 was interested in getting NBC.

Q Where is Channel 3?

A Channel 3 is in Lafayette and NBC service in Lafayette comes from Channel 7 in Lake Charles and because ABC was angry at Channel 3, they had granted an ABC part of the consideration was Channel 3 and though this area was served by 3, ABC, they granted thirty-one ABC affiliations and that made Channel 3 angry and they were looking to change to NBC if they could and the proposed increase at my expense, no obligation whatever was transferred, would be owned by the owners of Channel 7 and so that was the total reason for my filing the application.

Q Now if the application had been filed and had been approved, did that mean that you had to construct the tower?

A It did not mean you had to construct. My concern was keeping NBC on Channel 7 and honestly, it was the most inexperienced thing that the Nasco people was do is confirm they were inexperienced, but NBC was ready to do something about that, and in fact, following the Court's order and I forget the date, December of whatever year, it's been so long. I don't believe I have done anything to violate the Court's order intentionally to try to do anything but try to fulfill all of the directions of the Court and one of them was to keep NBC and keep status quo. And the day of the transfers I was busy calling NBC begging them to transfer the NBC contract to Nasco to fulfill the Court's

order which they did not want to do.

Q Now, the fact that you had so vigorously opposed the contract all the way through until the Court finally said you must do so by a certain date, that sort of flies in the face of you saying you were begging NBC to grant the transfer. Would you explain that, why you would be begging on the day or two before the closing to try to get them to go along with something that was beneficial to them and not you?

A I think you have the proof what I say is true because NBC would not grant Nasco even with my begging an extension beyond December 1, 1986. Which was the date that they had to be notified that they weren't going to extend the contract on NBC so you only had three months to run and I felt that if NBC refused and this is what I told NBC, the value of Channel 7 would go from whatever value it was to 50 percent of its value and I thought Judge Scott would hit me with all those damages and so my reasons were selfish for begging NBC as they were the day before the closing, getting the money, the bankers that were supplying the $18 million dollars were visiting me, asking me if I should recommend that they loan Nasco $18 million dollars and did I think the station was worth the $18 million dollars and here again, I gave them all of the recommendations that I could to go ahead and loan the $18 million dollars. And that was Tuesday. I believe it was Tuesday afternoon about 5:00 o'clock, two members of the bank group from Chicago who had not agreed to loan the money to Nasco were visiting me on Nelson Road asking me what my opinion was about the Nasco loan.

Q Now, at this time, Mr. Chambers, you didn't have the same counsel that you had earlier?

A That is correct.

Q Your counsel was advising you that you needed to do everything that was necessary to complete the sale. Had he not been advising you to that effect for months?



A Yes, he had and so had Mr. Gray. Mr. Gray had been advising me to do everything I could to complete the sale.

Q Okay, now I will get off that.

Number 17 has to do with the appeal, the respondent sought a stay of specific performance. Would I be correct in assuming that your answer would be the same with regards to that allegation that it was your attorneys who advised you that this was a viable legal tactic and that it was something that you should allow them to do?

A Yes.

Q You were not told I presume by Mr. Gray that to do so would subject you to sanctions if the tactic failed?

A No, I was not told that.

THE COURT: What tactic?

MR. TRITICO: this is when I — of course, I have to rely on the filing which they claim that the respondents sought a stay of the specific performance. I don't have the full text. What was the statements, stay.

MR. HOSKINS: What was Mr. Gray's motion? A motion to stay the judgment.

MR. TRITICO: A motion to stay the motion on merit pending the appeal apparently.

THE COURT: Oh, yes.

BY MR. TRITICO:

Q number 18 has to do with the 5th Circuit's unprecedented move of ruling from the bench affirming this Court's decision. Now, at the appeals level and the filing of the appeal. Were your attorneys, Mr. Gray and any others, did they all advise you that you should appeal or did they say well, Mr. Chambers, do you want to appeal. If so we will do so but we warn you that you may be sanctioned for doing so.

A They all advised me that we should appeal the decision. Sanctions were not mentioned.

Q As a matter of fact, were you not even advised by the

New Orleans firm that actually presented the argument to the 5th Circuit that you should continue on in further appeal?

A Yes, they did.

Q I'll mark this as Chambers 3.

MR. TRITICO: I say appeal as to some portion of that. Chambers 3.

THE COURT: Admitted.

BY MR. TRITICO:

Q I show you a copy of a letter sent to you on October 20, 1983, from Camp, Carmouche, et cetera signed by Mr. John F. Wadsieck and ask if you recall having seen such a letter having to do with the sale of the facility trust?

A Yes, I have seen that.

MR. TRITICO: We offer in evidence letter dated October 20, '83, signed by John Wadsieck identified as Chambers 4 statement. Your Honor we offer copy of a letter dated October 18, 1983 addressed to Honorable Nauman Scott from Camp, Carmouche which I'll identify as Chambers 5 which is a letter advising the Court that sale had taken place.

THE COURT: They're both admitted.

BY MR. TRITICO:

Q Now, Mr. Chambers, the closing of the sale that took place last year, were you present, physically present during the two and a half days at Mr. Scofield's office?

A Whenever I was asked to be present, I was present.

Q But wee you asked to be present?

A I was there at some time but I don't recall, the way I left it is if I was needed I would be there.

Q And your attorneys knew where you were at all times?

A Yes. Yes.

Q And I think you said something about the representatives of the bank that was going to lend the money were



at your office during these days as was some of the Nasco people?

A Well, I don't believe — these people came without Nasco.

Q Okay.

A They came to see me to get my opinion on loaning the $18 million dollars to Nasco and they were alone. And also I was working on the NBC problem at that time.

Q Okay. Mr. Smith complains about the inadequacy of your facilities on Prien Lake Road and the room which you provided to them. Do you by any chance have any photographs of that room?

A Yes, I do.

I think we made several pictures including pictures from the lobby.

Q I'll admit to the Court this is the first time I have seen them. Let's not — let's select some, not put any more than necessary in. I don't want this to be such an important thing in this or that we spend too much time on it. What is the photograph I'll mark as Chambers 6?

A This is looking down the hall from the air conditioned area to the door on the right. It's 56 feet from the doors right here to the door on the right which is where all of the material was placed.

Q Now, the door way that is in the forefront of the picture leads to where?

A It leads down the hall.

Q I don't mean the direction. I see what is behind — I don't see.

A That's the main entrance to the entire building.

Q And what does Chambers 7 purport to be?

A Chambers 7 is a view from the entrance to the door where everything has been left just like it was when the Nasco people were there and it's a room — it's a modern room thirty by thirty in size and it had to be large enough to contain the some several thousand documents that were in the

boxes that were in there, and we picked a room that would contain all the boxes so they didn't have to be moved back and forth.

Q All right. What does Chambers 8 purport to be?

Chambers 8 is moved in about halfway into the room from the entrance door showing all of the boxes that were made available to Nasco to examine, and some of them are sitting on the floor and some are sitting on the desk that we moved in there.

Q And Chambers 9?

A Chambers 9 is a close-up of the desks that were put in there for use by the Nasco people.

Q All right. Now, the boxes that appear in these photographs you say these were the same boxes that they were looking at?

A Yes, same boxes.

Q Mr. Scofield wanted me to ask you if we have a photograph of the thermometer. Do you know what thermometer he's talking about.

A I know that Mrs. Olander on her own put a thermometer in there.

Q Do you know how the question came up as the reason why there was a need for checking the temperature?

A Yes, I do because there was nothing but complaints from Mr. James Smith about everything and I asked Mrs. Olander what the temperature in the room was and she says I've got a thermometer and I'll put it in there and see and this, I think, followed my suggestion to one of the engineers there to put not just the small fan Mr. Smith referred to but to put a 24-inch fan in the door to pull that air conditioning down the hall into the room and it turned out that that presented another problem. It blew the papers so we moved it in there but we also moved it out because it didn't do the job.

Q And did the thermometer remain on the premises and if



so was it there for any subtle problem or suggested problem.

A Well, I couldn't answer that. You would have to ask Mrs. Olander but —

Q We will offer these photographs as Chambers 6 through 8.

THE COURT: Admitted.

* * * * *

Q Okay, and insofar as the appeal of that matter was concerned, you actively sought to have that matter appealed too, didn't you?

A I have not actively sought to have anything done. I have relied on my attorneys for what actions they thought was necessary in this case.

Q You are telling us then that you didn't actively seek to have this matter appealed insofar as the recusal is concerned?

A I'm telling you that I have not actively attempted to do anything in this suit but follow whatever legal procedures I could to keep from having to transfer KPLC TV in Lake Charles.

MR. TORIAN: Your Honor, we have no further questions. Thank you very much.

THE COURT: any further questions of this witness?

MR. SCOFIELD: I have a few.

THE COURT: All right, sir.

MR. SCOFIELD: I'll be brief.

EXAMINATION BY

MR. SCOFIELD:

Mr. Chambers, we have been at this, in this litigation for over four years. Has it been a long and a expensive battle for you?

A Yes.

Q Do you have any idea how much you have spent on fees

and expenses of your attorneys who have represented you throughout the course of this litigation?

A I haven't looked at any records as to the total cost, no

A Could you give me an estimate?

A No, I couldn't.

Q That's not significant to you?

A Very significant but spending more money taking the cost of other legal matters out of it would just cost more so I do know generally what I have spent on legal expenses in the last four years but it includes many other things other than this litigation.

Q Would you agree with your own statement in your brief that you have spent in this litigation enormous sums in attorneys fees?

A Yes.

Q That was a statement made by Mr. Tritico or was that a statement made by you?

A Well, Mr. Tritico made the statement. He prepared it, and he used the word enormous. I think he qualified that a little by saying that $48 thousand dollars for a frivolous appeal was enormous for what was required so I think he would use enormous in a manner that referred to what you got and what you charged.

Q We are talking about the fees that you spent. What he was saying that you spend enormous amounts of money for fees, you agree with that?

A I intended to answer that by saying he thought the $48 thousand dollars that you all listed as your fee was enormous for the work done and he would therefore think other fees were enormous may be different than I would. I think anything you spend on legal fees is big.

Q Are you disagreeing with me that Mr. Tritico said in your brief that you, G. Russell Chambers, has spent enormous sums in fees on this case?

A No, that's correct. In my mind and I have a number in



my own mind what I call enormous and they were enormous fees.

Q If Mr. Tritico as a payee of the fees called them enormous. I presume you as payer certainly consider them to be enormous.

MR. TRITICO: Just a minute. I object to counsel — I don't have any problem with you saying what I said but I want it clear that the enormous fees weren't all paid to Russell Tritico, the payee.

MR. SCOFIELD: I said a payee.

MR. TRITICO: And I agree they were enormous. Anything over $10 thousand dollars is enormous to me.

BY MR. SCOFIELD:

Q Okay. Mr. Chambers, during the course of this litigation, did you at any time act improperly or in bad faith in conjunction with this litigation?

A I could say I didn't act in bad faith. Improperly would be something that someone else would judge. I don't think I acted improperly in this entire case.

MR. SCOFIELD: Thank you.

* * * * *

March 31, 1988

Mr. David Hoskins, Esq.
1114 Ryan Street
Lake Charles, Louisiana 70602

"HAND DELIVERED"

Re: NASCO, Etc.

Dear David:

In view of the time constraints facing all of us, consider this as a formal request for copies of the itemized billing for what NASCO contends are their total fees in connection with the claim for sanctions. As we appreciate the jurisprudence on this subject, the fees should be separated on the basis of each particular item that might be considered sanctionable, albeit your position may differ at this point. In addition to a generalized billing as was presented already, we request a copy of the computer backup, (if that is how the bills were posted) showing the hours, the work performed, the subject matter involved, the attorney involved, and/or the assistant-paralegal. In addition, since we must look to the accuracy and/or reasonableness of such billing, we request a copy of all other hours billed by that same attorney on the same dates as the bills in connection with this case, in which that attorney may have billed other hours for different clients. We recognize the possibility of confidentiality as to "other clients", and the names of these clients could be whited out, so that all we would be seeing is the attorney involved, the work performed and the hours billed on a particular day.

We would like to have these as soon as possible for obvious reasons.



Thanking you for your anticipated cooperation, I AM

Yours truly,

RUSSELL T. TRITICO

RTT/ca

cc: All counsel

Mr. Russell Tritico April 5,1988
Attorney at Law
130 West Kirby Street
Lake Charles, LA 70602

Re: NASCO, Inc.
Vs. No. 83-2564
Calcasieu Television and Radio, Inc.,

Dear Russell:

Enclosed please find the following:

(1) Itemized billing statements of the Scofield, Bergstedt, Neal & Harwell, and Crowell & Moring law firms;

(2) A list of attorneys and hourly billing rates (Scofield, Bergstedt) in effect during the course of this litigation (I believe all rate changes occurred on September 1 of the year in question).

The additional materials you requested are not enclosed. In light of the Court's remarks during the last Status Conference, we consider those materials to be irrelevant to the proceedings, and not calculated to lead to the discovery of admissible evidence. Because of record retention policies of the various firms, such information is not readily available, and would be exceedingly burdensome, if not flatly impossible, to reconstruct.

By copy of this letter, I submit copies of the enclosed materials to all counsel of record, and to the Court.

Yours very truly,
/s/ David
DAVID L. HOSKINS

DLH/gc
Enclosure
cc: The Honorable Nauman S. Scott
All Counsel of Record

IN ACCOUNT WITH

NEAL & HARWELL

800 THIRD NATIONAL BANK BUILDING

NASHVILLE, TENNESSEE 37219-2084

(615) 244-1713

January 5, 1984

IDENTIFICATION #62-1017545

Nasco, Inc.
P. O. Box 576
27 North Main Street
Springfield, Tennessee 37172

ATTENTION: Mr. Stephen I. Geringer

**TO LEGAL SERVICES: (October 1, 1983 - December 31, 1983)**

**NASCO V. CALCASIEU TELEVISION AND RADIO, INC. et al.**

Telephone conference with Jon Golden, counsel for Mr. Chambers; telephone conference with Steve Geringer; second telephone conference with Jon Golden; office conference between Mr. Harwell and Mr. Ross; telephone conferences with Mr. Geringer and Mr. Smith; office conference between Mr. Harwell and Mr. Ross re: KPLC-TV acquisition; office conference with Steve Geringer re: status of KPLC-TV matters; telephone conference with Brian Byrnes; office conference between Mr. Ross and Mr. Harwell; attempts to contact Jonathan Golden by telephone; letter to John Scofield; telephone conferences with Brian Byrnes and Jim Smith; telephone conference with Jon Golden; telephone conference with Jim Smith; telephone conference with Mr. Golden's office; telephone conference with Steve Geringer; telephone conference with Bill Cook; office conference between Mr. Harwell and Mr. Sullivan; telephone conference with Jim Smith; telephone conference with Robert Sullivan; telephone conference with Jon Golden's office; telephone conference with Steve Geringer; telephone conference with Mr. Golden re: additional agreements; conference between Mr. Ross and Mr. Harwell re: additional agreements; legal research re: Specific Performance; two telephone conferences with Jon Golden; telephone conference with Steve Geringer; office conference between Mr. Harwell and Mr. Ross, to obtain contract from Russ Chambers; telephone conference with Mr. Golden; telephone conference among Mr. Harwell, Mr. Ross and Mr. Golden; telephone conference with Jon Golden; office conference between Mr. Harwell and Mr. Ross; telephone conference with Steve Geringer; commence preparation to draft suit papers; review file, commence drafting complaint; telephone conference with Brian Byrnes; conference between Mr. Harwell and Mr. Ross; conference with Jim Thomas re: preparation of Complaint; office conference with Jon Ross; office conference with Jon Ross and Jim Thomas re: preparation of pleadings to

sue Mr. Chambers and Calcasieu Television and Radio, Inc.; prepare draft complaint and other pleadings; preparation of Complaint; telephone conference among Mr. Golden, Mr. Ross and Mr. Harwell; telephone conference with Ben Mount; conference between Mr. Ross and Mr. Thomas; telephone conference with Steve Geringer; many telephone conferences with Jon Ross; telephone conference with Bill Cook; review of Complaint and making proposed changes to Complaint; conference with Jim Thomas re: Complaint and pleadings; preparation of Complaint, T.R.O., Motion for T.R.O., and Bond on T.R.O.; telephone conference with Ben Mount re: Mr. Chambers' residence; telephone conferences with Steve Geringer; telephone conferences with Jon Golden re: settlement; meeting with Mr. Geringer, Mr. Cook, Mr. Byrnes and Mr. Smith re: Complaint and its allegations; assist in preparation of complaint and supporting documents; preparation of Complaint, Temporary Restraining Order, Motion for Temporary Restraining Order, Bond on Restraining Order, conference with Steve Geringer, Jim Smith and Brian Byrnes; telephone conference with Jim Smith; telephone conference with Jon Golden; memorandum of telephone conference with Mr. Golden; telephone conference with Mr. Golden's office; telephone conferences with Ben Mount; conference with Carson Stone; office conference with Jon Ross; revision of Complaint; telephone conferences with Jonathan Golden; telephone conferences with Al Phillips' office regarding bond; telephone conference with Ms. Lewis re: Court appearance on request for T.R.O. before Judge Scott; telephone conferences with Brian Byrnes, Steve Geringer, and Jim Smith; coordinating filing of lawsuit in Lake Charles, Louisiana; travel to and from Lake Charles, Louisiana; telephone conference with Jim Smith re: property transfer; telephone conferences with John Scofield re: property transfer on Sunday, October 16, 1983, and recorded Monday morning, October 17, 1983; telephone conference with Jim Thomas re: legal research concerning property transfer as being a Contempt of Court; legal research re: Contempt; telephone conference with Jon Ross from Kentucky; telephone conferences with Brian Byrnes, John Scofield and Mr. Harwell; legal research re: preliminary injunction; preparation of Amended Complaint; conference with Jim Thomas re: Memorandum in Support of Motion for Preliminary Injunction; research on and preparation of Motion for Preliminary Injunction; review and revise Amended Complaint; prepare Preliminary Injunction; prepare Temporary Restraining Order; conference with Jim Thomas regarding Memorandum in Support of Motion for Preliminary Injunction; telephone conferences with Brian Byrnes, Steve Geringer and John Scofield and John Stewart; draft Memorandum in Support of Motion for Preliminary

Injunction; office conference with Jon Ross; telephone conference with Jon Ross; review of pleadings in U. S. District Court in Lake Charles, Louisiana; telephone conference with Steve Geringer; analysis of amended complaint regarding transfer of real property by Calcasieu Television and Radio, Inc.; telephone conferences with Mr. Byrnes and Mr. Scofield; prepare Amended Complaint, T.R.O., Motion for T.R.O., Motion for Preliminary Injunction; Preliminary Injunction and Memorandum in Support of Preliminary Injunction; conference with Mr. Harwell; conference with Steve Geringer; conference with Brian Byrnes; final revisions to Memorandum in Support and Motion for Preliminary Injunction; travel to Alexandria, Louisiana; prepare for Preliminary Injunction hearing; telephone conference with Steve Geringer; telephone conference with Jon Ross regarding Judge Scott issuing TRO against trustee and setting preliminary injunction hearing date; court appearance on Motion for T.R.O. and Preliminary Injunction; travel to Nashville from Alexandria, Louisiana; conference with Aubrey Harwell and Jim Thomas; telephone conference with Mr. Scofield; organize file after T.R.O. hearing; letter to John Stewart enclosing pleadings; telephone conference with Brian Byrnes; telephone conference with Bill Cook; telephone conference with Steve Geringer; office conference with Jon Ross regarding mandatory injunction hearing; conference call with Jon Ross and Mr. Scofield; telephone conference with Mr. Scofield; telephone conferences with John Scofield; conference between Mr. Harwell and Mr. Ross re: discovery; conference between Mr. Harwell and Mr. Ross; long conference with Jim Smith and Brian Byrnes; telephone conference with Jim Smith; review documents and prepare chronology of events; telephone conferences with Steve Geringer; conference between Aubrey Harwell and Jon Ross; telephone conference with Brian Byrnes; telephone conference with Jim Smith; telephone conference with Brian Byrnes regarding meeting; review correspondence from Court regarding preliminary injunction; prepare chronology; organize entire file; preparation for Louisiana depositions; telephone conferences with Mr. Scofield; telephone conferences with John Scott; letter to Mr. Scofield; meeting with Jim Smith and Brian Byrnes to prepare for depositions; organize files and prepare for depositions in Louisiana; review documents, notes and chronology; travel to Lake Charles, Louisiana; prepare for depositions of Mr. Chambers, Ms. Guillory, Jim Smith and Brian Byrnes; telephone conference with Jon Ross regarding depositions; attend depositions of Brian Byrnes and James B. Smith; take depositions of Ms. Guillory and Mr. Chambers; prepare for resumption of deposition of Mr. Chambers; conference with Mr. Smith, Mr. Scofield and Mr. Byrnes before and after depositions; conference with Mr. Scofield, Mr. Byrnes and Mr. Smith; take deposition

SCOFIELD, BERGSTEDT, GERARD, MOUNT & VERON
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW
POST OFFICE DRAWER 3028
LAKE CHARLES, LOUISIANA 70602

TAX I.D. NO. 72-0843004

1745 DECEMBER 31, 1983

CHANNEL COMMUNICATIONS *
- GENERAL
THIRD NAT'L. BANK, 8TH FLOOR
NASHVILLE, TN 1 37219

| TE | SERVICE |
|---|---|
| '21/83 | TEL. CONF. W/ MIKE SWAIN IN JUDGE SCOTT'S OFFICE; LEGAL RESEARCH ON DIVERSITY; THREE TEL. CONFS. W/ JON ROSS; TEL. CONF. W/ AUBREY HARWELL; TEL. CONF. W/ LEONARD FUHRER |
| '23/83 | REV. OF FILE DOCUMENTS IN PREP. FOR HEARING; TRIP TO ALEXANDRIA; MEETING W/ JIM SMITH, BRIAN BURNES & JON ROSS; PREP. FOR HEARING |
| '24/83 | ASSISTED MARIAN IN CHECKING CONVEYANCE RECORDS<br>CHECKING CONVEYANCE RECORDS AT CT. HOUSE<br>TEL. CONF. W/ JBS, RE: BIRMINGHAM LAW FIRM TO AFFECTUATE<br>TEL. CONF. W/ TIM PECARO; TEL. CONF. W/ JBS; TEL. CONF. CALL W/ TIM PECARO, JBS, AL SMITH & JIM SMITH<br>SERVICE ON MABEL CHRISTINE BAKER; REV. OF MARTINDALE-HUBBLE LAW DIRECTORY; TEL. CONF. W/ FRANK M. YOUNG, III, RE: SERVICE OF PROCESS IN BIRMINGHAM, AL<br>PREP. FOR HEARING; CONF. W/ JON ROSS, JIM SMITH & BRIAN BURNES; CONF. W/ CLERK OF CT.; CONF. W/ JACK GRAY; CONF. W/ JUDGE SCOTT & PARTIES; TEL. CONF. W/ GEORGE BAKER; TRIP TO LAKE CHARLES; PREP. OF DOCUMENTS FOR SERVICE; TEL. CONF. W/ JON ROSS' SEC.; CORRES. TO MR. YOUNG; CORRES. TO MRS. BAKER; CONF. W/ JIM SMITH; TEL. CONF. W/ DONNA PALMER |
| 25/03 | FIVE TEL. CONFS. W/ JIM SMITH; FOUR TEL. CONFS. W/ JACK GRAY; INTER-OFFICE CONF. W/ BWM<br>REV. OF NEW ACTS OF LEGISLATURE ON TAX CREDITS FOR NEWLY HIRED EMPLOYEES<br>TEL. CONF. W/ PARALEGÀL IN BIRMINGHAM, RE: SERVICE INSTRUCTIONS |
| 26/83 | TEL. CONF. W/ C. GILLESPIE, RE: ATTEMPTS TO SERVE CHAMBERS; INTER-OFFICE CONF. W/ JBS; CONF. W/ C. GILLESPIE<br>TEL. CONF. W/ JACK GRAY |
| 27/83 | TWO TEL. CONFS. W/ JACK GRAY; TEL. CONF. W/ JIM SMITH; THREE TEL. CONFS. W/ JON ROSS; TEL. CONF. W/ AUBREY |

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POST OFFICE DRAWER 3028
LAKE CHARLES, LOUISIANA 70602

TAX I.D. NO. 72-0843004

1745 DECEMBER 31, 1983



| | |
|---|---|
| | HARWELL; TWO TEL. CONFS. W/ RICHARD CURRY; PREP. OF PRELIMINARY INJUNCTION AGAINST MABEL BAKER |
| '28/83 | TEL. CONF. W/ JUDGE SCOTT; TEL. CONF. W/ RICHARD CURRY; REVISION OF PRELIMINARY INJUNCTION; CORRES. TO JUDGE SCOTT; TEL. CONF. W/ JON ROSS |
| '31/83 | REV. RETURN RECEIPT ON SERVICE ON MABEL BAKER; REV. OF CORRES.--FRANK YOUNG; RETURN OF SERVICE; CORRES. TO ROBERT SHEMWELL; TEL. CONF. W/ JACK GRAY'S OFFICE; TEL. CONF. W/ JIM SMITH |
| | TEL. CONF. W/ FRANK YOUNG, ATTY. IN BIRMINGHAM, RE: SERVICE |
| /01/83 | INTER-OFFICE CONF. W/ JBS, RE: RESEARCH, RE: TRANSACTION PRIOR TO TRO APPLICATION |
| | REV. OF CERTIFIED COPY OF PRELIMINARY INJUNCTION; TEL. CONF. W/ JACK GRAY; TEL. CONF. W/ JOE WILLIAMS; TEL. CONF. W/ JON ROSS' OFFICE; PREP. OF NOTICE OF DEPOS.; INTER-OFFICE CONF. W/ AHW |
| /02/83 | TEL. CONF. W/ RICK CURRY, RE: DEPOS. OF MRS. BAKER |
| | RESEARCH, RE: FRAUDULENT TRANSFER |
| /03/83 | REV. OF CORRES.--JUDGE SCOTT; INTER-OFFICE CONF. W/ BWM; TEL. CONF. W/ JON ROSS; REV. OF TRANSCRIPT OF RITA GUILLORY INTERVIEW |
| | VIEWING OF LIVE AT FIVE SEGMENT ON KPLC TELEVISION, RE: SALE OF STATION; TRANSCRIPTION OF TAPED SEGMENT OF AUDIO PORTION |
| | RESEARCH, RE: FRAUDULENT CONVEYANCES; WORK ON MEMO |
| /04/83 | TWO TEL. CONFS. W/ JON ROSS; TEL. CONF. W/ JACK GRAY; REV. OF CORRES.--RICHARD CURRY; LEGAL RESEARCH; INTER-OFFICE CONF. W/ AHW |
| | INTER-OFFICE CONF. W/ JBS, RE. RESEARCH, RE: FURTHER RESEARCH, RE: FRAUDULENT CONVEYANCE, SPECIFIC PERFORMANCE OF PURCHASE & SALE CONTRACT |
| /05/83 | RESEARCH, RE: SPECIFIC PERFORMANCE |
| /06/83 | REV. OF DOCUMENTS IN PREP. FOR DEPOS. |
| /07/83 | PREP. FOR CONF. W/ JIM SMITH, BRIAN BURNS & JON ROSS; TAKE DEPOS. OF BURNS, SMITH, RITA GUILLORY & RUSS CHAMBERS; REV. OF CORRES.--FRANK YOUNG |
| /08/83 | PREP. FOR & TAKING OF DEPOS. OF RUSSELL CHAMBERS; CONF. |

SCOFIELD, BERGSTEDT, GERARD, MOUNT & VERON
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POST OFFICE DRAWER 3028
LAKE CHARLES, LOUISIANA 70602

TAX I.D. NO. 72-0843004

1745 DECEMBER 31, 1982



W/ SMITH, BURNS & ROSS
TRIP TO PAR. CT. HOUSE; CHECK RECORDS TO SEE IF SUIT HAS BEEN FILED NAMING NASCO OR CHANNEL COMMUNICATIONS AS DEFENDANT; TEL. CONF. W/ MARTY NATALI, U. S. DIST. CT., WESTERN DIST. - LAKE CHARLES DIVISION; TEL. CONF. W/ DIANE, FED. CLERK'S OFFICE IN SHREVEPORT

1/10/83 RESEARCH, RE: SIMULATIONS; BONA FIDE PURCHASERS
REV. OF ANSWERS OF KPLC & RUSSELL CHAMBERS

/11/83 RESEARCH, RE: FRAUDULENT CONVEYANCES

/14/83 CONTINUE RESEARCH, RE: FRAUDULENT CONVEYANCE
TEL. CONF. W/ JIM SMITH; TEL. CONF. W/ JACK GRAY'S OFFICE; CORRES. TO JIM SMITH

/15/83 TWO TEL. CONFS. W/ JACK GRAY

1/16/83 TEL. CONF. W/ JIM SMITH; TEL. CONF. W/ JACK GRAY; CORRES. TO FRANK YOUNG; TEL. CONF. W/ RICHARD CURRY

/17/83 REV. OF RESEARCH NOTES; BEGIN DRAFT OF MEMO
TEL. CONF. W/ JACK GRAY; TEL. CONF. W/ JIM SMITH; TEL. CONF. W/ FRANK YOUNG'S OFFICE; INTER-OFFICE CONF. W/ AHW, RE: LEGAL RESEARCH; REV. OF DOCUMENTATION

/18/83 TEL. CONF. W/ FRANK YOUNG'S OFFICE; TEL. CONF. W/ RICHARD CURRY; TEL. CONF. W/ JACK GRAY; PREP. OF NOTICE OF DEPOS.; CORRES. TO FRANK YOUNG; CORRES. TO JIM SMITH; TEL. CONF. W/ FRANK YOUNG; LEGAL RESEARCH; TEL. CONF. W/ JIM SMITH
ASSISTED IN CHECKING CONVEYANCE RECORDS TO SEE IF ACT OF DONATION IN TRUST & LEASE AGREEMENT HAD BEEN RECORDED IN CAL. PAR.

1/21/83 LEGAL RESEARCH, RE: MOTION FOR CONTEMPT
COMPLETE RESEARCH, RE: FRAUDULENT CONVEYANCE; CONTINUE DRAFT OF MEMO

1/22/83 COMPLETE FILE REV.; ORGANIZING & ASSEMBLING CORRES., PLEADINGS, RESEARCH & NOTES FILES; DICTATING INDEX TO PLEADING FILE
TEL. CONF. W/ JAY WALLER W/ FRED YOUNG'S OFFICE IN BIRMINGHAM, RE: DEPOS.; REV. OF INSTRUMENTS, RE: SHERRY ABICRONKE; 2D TEL. CONF. W/ JAY WALLER, RE: ISSUANCE OF SUBPOENAS

1/23/83 ASSIST MNB W/ FILING

CROWELL & MORING
1100 CONNECTICUT AVENUE, N. W.
WASHINGTON, D. C. 20036
(202) 452-5800

BILLING INVOICE

15599-010
070:tlc

10378 11-30-83

Channel Communications, Inc.
3200 West End Avenue, Suite 405
Nashville, Tennessee 37203

STATEMENT OF ACCOUNT

| | | | |
|---|---|---|---|
| Professional Services Rendered During October, 1983: | | $ ~~416.25~~ | 186.25 |
| **Expenses Incurred For Your Account:** | | | |
| Reproduction of Documents | $ 84.70 | | |
| Telephone/telegraph/telex | 20.37 | | |
| Postage | .60 | | |
| Messenger Service | 16.35 | ~~122.02~~ | -0- |
| Total Services and Expenses: | | $ 538.27 | |
| Balance Carried Forward: | | - 0 - | |
| TOTAL: | | $ 538.27 | |

(4)

# NO. 90-256



# In the Supreme Court of the United States

OCTOBER TERM, 1990

G. RUSSELL CHAMBERS
Petitioner,

v.

NASCO, INC.
Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

## BRIEF OF PETITIONER ON THE MERITS

JOHN B. SCOFIELD
DAVID L. HOSKINS*
SCOFIELD, GERARD, VERON,
HOSKINS & SOILEAU
P.O. Drawer 3028
Lake Charles, LA 70602
(319) 433-9436

AUBREY B. HARWELL, JR.
JON D. ROSS
NEAL & HARWELL
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150 4th Avenue North
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(615) 244-1713

Attorneys for Respondent

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New Orleans, LA 70130
(504) 525-4400

RUSSELL T. TRITICO P.C.
714 Pujo Street
Lake Charles, LA 70602
(318) 436-6648

Attorneys for Petitioner

*Counsel of Record

PETITION FOR CERTIORARI FILED AUGUST 2, 1990
CERTIORARI GRANTED OCTOBER 1, 1990

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

58

## QUESTIONS PRESENTED

Plaintiff was awarded its entire attorney's fees in this diversity case—slightly over $1,000,000. Since the controlling state law provided no basis for the award, and in fact positively would not have allowed it, the award was granted under the "inherent power" of the court pursuant to the "bad faith" exception to the general American rule against fee shifting.

1. What, if any, is the scope of a federal court's "inherent power" to shift the entire burden of attorney's fees? Does it include the ability to shift fees in a diversity case in contravention of the law of the forum state?

2. If so, what are the limitations upon the exercise of this "inherent power?" For example, if the award is authorized as a "sanction," are the general requirements imposed upon an award of "sanctions," such as the prohibition against massive post-judgment retributive sanctions not reasonably tailored to the wrong sought to be redressed, operative? Can the award include reimbursement for expenses incurred before appellate courts and administrative agencies because of conduct not deemed "frivolous" by those higher courts or agencies? Can the award include reimbursement for fees incurred by a party who fails to mitigate his or her expenses? Does the general attorney's fees award requirement of "reasonableness" apply? Additionally, are due process requirements and the prohibition against excessive fines relevant?

## RULE 24.1(b) AND 29.1 STATEMENTS

**The following persons and entities were parties below, but are neither petitioners nor respondents herein:**

1. **Calcasieu Television and Radio, Inc.**
2. **A.J. Gray, III**
3. **Edwin A. McCabe**
4. **Richard A. Curry**
5. **Mabel C. Baker**

**There are no parent or subsidiary companies of petitioner to be listed.**



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MISCELLANEOUS (continued)

MISCELLANEOUS (continued)





IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No.90-256

G. RUSSELL CHAMBERS

v.

NASCO, INC.

## BRIEF OF PETITIONER ON THE MERITS

## OPINIONS BELOW

The Opinion of the United States Fifth Circuit Court of Appeals (Pet. App., 59a-83a) is reported at 894 F.2d 696. The Opinion of the United States District Court for the Western District of Louisiana (Pet. App., 1a-58a) is reported at 124 F.R.D. 120.

## JURISDICTION

The Opinion of the United States Fifth Circuit Court of Appeals was rendered on February 6, 1990. A timely petition for rehearing was denied on May 4, 1990. (Pet. App., 84a-85a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The Petition for writ of certiorari was granted on Oct. 1. 1990.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eighth Amendment to the United States Constitution provides in full as follows:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. The Fourteenth Amendment to the United States Constitution provides in pertinent part as follows:

   . . .nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

3. Section 1927 of Title 28 of the United States Code (28 U.S.C. § 1927) provides in full as follows:

   Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally such excess costs, expense, and attorneys' fees reasonably incurred because of such conduct.

4. Rule 11 of the Federal Rules of Civil Procedure provides in pertinent part as follows:

   If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney's fee.

## STATEMENT OF THE CASE

On August 9, 1983, NASCO, INC. ("NASCO") and Calcasieu Television and Radio, Inc. ("CTR") entered into an agreement (the "Purchase Agreement") to buy and sell



some of the assets used in the operation of KPLC-TV, the NBC affiliate in Lake Charles, LA, for $18,000.000. The Purchase Agreement was signed on behalf of CTR by its president, G. Russell Chambers ("Chambers"). (1R22).

Shortly thereafter, when certain information concerning NASCO's plans for the station came to Chambers' attention, he determined that it was not in the public interest to close the sale. He contacted his attorneys of eleven years, the Camp, Carmouche firm of Lake Charles, Louisiana, and advised them of his desire to cancel the sale and avoid transferring the station, that he was willing to pay damages to NASCO if necessary, and asked if anything could be done to effect his wishes. (R51-53)[1]

The matter was assigned by the managing partner, Edwin Hunter, to the chief litigator, A.J. Gray, III, who discovered that the Purchase Agreement had not been recorded in the public records. Gray then devised a plan to transfer the station to a third party to take advantage of Louisiana's Public Records Doctrine, and avoid specific performance should Chambers be sued. This plan was communicated to Chambers with the explanation that it was a viable way to prevent NASCO from acquiring the KPLC assets. (R 57, 152) As proposed, Chambers doubted the viability of the defense because it sounded "as if it was a lawyerly trick that would not likely be sustained." (R 67, 153) Eventually Gray persuaded Chambers, who "decided to take [Gray's] advice, after a fashion." (Gray #4, at 7; R 214). Chambers believed the defense was valid only on the advice of counsel, and he allowed its assertion only to further his purposes of protecting the public interest by avoiding specific performance of the Purchase Agreement, while offering to pay damages. (R 56)

[1] Record cites with no volume number preceding them refer to the transcript of testimony taken before the District Court on April 11, 1988, at the trial of the sanctions phase of this case. Chambers' testimony is included in the Joint Appendix, Volume II, at 93.

It was decided by the Camp, Carmouche lawyers that a trust that Chambers had long considered and had prepared drafts of for the benefit of his children should be created, and that the trust should be the transferee of the KPLC assets. Notice was given to Gray that a lawsuit was to be filed by NASCO on Monday, October 17 1983 to enforce the Purchase Agreement, and that this suit would involve some sort of injunctive relief. Gray believed that if the transfer documents were executed prior to issuance of any restraining order, his Public Records Doctrine Defense would be a *fait accompli.* (22 R 3426-27) Therefore, the transfer documents were drafted the weekend of October 15, 1983. The signature of the trustee, Chambers' sister Mabel Baker, was obtained on October 17, 1983, and the transfer instruments were recorded on Monday, October 17, 1983 at 8:30 a.m. (22 R 3428-29).

NASCO filed a diversity suit on October 17, 1990 against Chambers and Calcasieu Television, Radio and in the United States District Court for the Western District of Louisiana. When the suit, which requested specific performance, punitive damages, and injunctive relief to prevent the encumbrance of KPLC, was filed the trial court contacted Gray to elicit his comments on behalf of Chambers regarding a TRO that the court was prepared to sign freezing the KPLC assets. (22 R 3429). Gray failed to disclose to the court that a transfer of the assets had already been effected, although, after consultation with his law partners, he immediately advised the court of the transfer on the following day. (1 R 136; R 166).

Various injunctions were issued by the trial court to prevent further transfers of encumbrances of the KPLC assets. (2 R 153, 253). When the litigation went into the discovery phase, Chambers was found in contempt of court for acting on the separate advice of two law firms and not giving NASCO physical possession of the general ledger of Calcasieu Television and Radio (even though it had been given full access to view it) rather than merely those portions of the books that pertained to KPLC. (3 R 312; R 74)



Gray continued to prosecute the suit, without any direction from Chambers. (22 R 3156; R 88, 125, 128) Various pre-trial motions were filed, defenses were asserted, and a cross-claim was filed. The thrust of Gray's defense was the assertion of the Public Records Doctrine and allegations that Chambers was excused from performing because of NASCO's prior breach of the Purchase Agreement (a doctrine known as mora creditoris in Louisiana).

Numerous pre-trial conferences were conducted by the trial court in an attempt to shape and narrow the issues of the litigation, and to rule on various discovery motions (*E.g.* 5 R 613; 6 R 863; 8 R 1007). Eventually, the trial court determined to bifurcate the issues presented by the case, and entered an order that NASCO's claim for specific performance would be tried first, and only those defenses applicable thereto would be considered at that time. (9 R 1176)

On the eve of trial, Gray stipulated on behalf of Chambers that the Purchase Agreement was enforceable, that NASCO had not breached it, and that Chambers was in breach of the Agreement. His stated purpose for doing so was to eliminate all issues other than the Public Records Doctrine defense. (43 R 96) Chambers was not informed of the stipulation until a few minutes before it was made, and was not explained its significance or "eventual meaning." (R 96)

The trial court rejected that defense, finding the transfer of the KPLC assets to Baker to be a "simulation," fraudulent, and therefore an absolutely nullity. Chambers and Calcasieu Television, Radio and were ordered to specifically perform the Purchase Agreement. (J.A.6).

On appeal, the United States Court of Appeals for the Fifth Circuit issued a *per curiam* affirming the trial court, and finding that the appeal was frivolous under

Federal Rule of Appellate Procedure 38. The Court fixed damages to be double costs, and the "appellee's attorneys' fees, if reasonable, expended in the prosecution of this appeal." Additionally, the Court of Appeals remanded "for a determination of whether sanctions in the form of costs and attorney's fees should be imposed against the appellants and/or their attorneys under Fed. R. Civ. P. 11 and against counsel for the appellants under 28 U.S.C. § 1927 as it relates to the proceedings in the district court." (J.A. 46-50)

While the litigation was progressing, Chambers had continued to invest in Calcasieu Television, Radio and to the tune of $580,000 in station improvements. (38 R 69) When NASCO claimed entitlement to those improvements, Chambers offered to convey those assets that "replaced" assets that were covered by the Purchase Agreement, but refused to convey upgrades unless fair market value was paid. (38 R 38, 46) NASCO obtained the assistance of the trial court, who, while terming this an "honest" and "good faith" disagreement (34 R 24), nonetheless issued a ruling that Chambers had to convey free of charge all of the improvements claimed by NASCO even though not an object of the Purchase Agreement.

NASCO and CTR then closed the sale of the KPLC-TV assets, and settled a claim by NASCO for delay damages for $850,000. (18 R 2636) NASCO and CTR were prevented from settling a claim for attorneys' fees because the trial court made it known that the matter of sanctions was its exclusive domain, and that it would not approve any such settlement. (23 R 3254)

Sixteen months following the Court of Appeals' remand, NASCO filed a Motion to Fix Compensatory Damages Pursuant to Contempt Judgment, to Fix Appellate Sanctions, and to Impose Sanctions. ( 19 R 2639) NASCO prayed that the court fix the amount of the sanction imposed by the appellate court for the frivolous appeal. Additionally, NASCO went beyond the mandate of the appellate court and prayed that the trial court impose



sanctions "including, but not limited to, all attorney's fees, expenses, and costs incurred by NASCO in these proceedings, and in the administrative proceedings before the F.C.C." Since neither Rule 11 nor 28 U.S.C. § 1927, the two bases for sanctions specified in the remand order by the Fifth Circuit Court of Appeals, were sufficient to authorize the trial court to grant the relief requested by NASCO, NASCO urged the trial court to award it all of its attorneys' fees incurred in the entire proceeding under the "inherent power" of the court. Included as defendants were Chambers' attorneys, (Gray and Edwin A. McCabe), Baker, and her attorney, Richard A. Curry.

Following the hearing, the trial court granted NASCO's motion, and sanctioned all parties named as defendants in NASCO's Motion. (Pet. App. 1a) Baker was reprimanded; Gray was disbarred from the Western District of Louisiana, with no ability to reapply for admission for three years; McCabe was declared ineligible to practice in the Western District for five years; and Curry was suspended from practice in the Western District for six months. (Pet. App., 54a, 55a, 56a). Judgment was entered against Chambers personally in the sums of $66,286.65, representing the amount of the sanctions imposed by order of the United States Court of Appeals for the Fifth Circuit, and $996,644.65, representing the total attorney's fees and expenses incurred and paid by NASCO, Inc. in this matter. (Pet. App., 52a). Finding Rule 11 and 28 U.S.C. § 1927 inappropriate for its purposes, the trial court relied exclusively upon its "inherent power" in imposing these sanctions, including the award of attorneys' fees. (Pet. App., 42a-47a).

The United States Court of Appeals for the Fifth Circuit affirmed. (Pet. App 59a) The court rejected Chambers' argument that the trial court did not possess the "inherent power" to award attorney's fees because Louisiana law, the controlling law, did not allow such an award. Instead, the court found that federal courts always possess the "inherent power" to shift the full burden of attorneys' fees in order to police against abusive litigation practices. (Pet.

(App., 72a-78a). The court also rejected Chambers' argument that the general rules governing sanctions, such as the requirements of swiftness, mitigation, and reasonable relation to wrong, should apply to the award. Instead, the court found that the existence of "vertical" powers, such as those granted to the courts by Rule 11 or 28 U.S.C. § 1927, does not constrain the courts from exercising "horizontal" powers, such as the "inherent power" to shift attorneys' fees. (Pet. App., 69a-72a).

## SUMMARY OF ARGUMENT

In *Alyeska Pipeline Services v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), this Court held that federal courts do not have inherent power to assess attorneys' fees in contravention to the general American rule against fee shifting. This power is reserved to the legislature. The only permissible deviations from this rule are common law exceptions that have been recognized by the courts for so long without legislative interference as to suggest tacit approval. Among these exceptions is when one party is guilty of vexatious, oppressive, or harassing conduct — "bad faith." But, as this Court was careful to note, this exception, which is a legacy of the common law chancery courts of equity, is not available to a federal court in diversity cases unless the controlling state law recog-nizes the exception. This Court's holding was based upon a correct application of *Erie Railroad v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938), and *Hanna v. Plummer*, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed. 2d 8 (1965). Since *Alyeska*, a unified chorus of opinions from every circuit court of appeal and a multitude at the district court level have recognized both the "bad faith" exception and its limitation in diversity cases. No court has ever invoked the "bad faith" exception in a diversity case unless the doctrine was a part of the law of the forum state until now.

In this case, the lower courts have sanctioned petitioner $1,000,000 by invoking the "bad faith" exception



in a diversity case where such a fee shift is absolutely contrary to the forum state's law, as expressed in its Civil Code and its jurisprudence. The purported authority for this act was the "inherent power" of a federal court to prevent abuse of its processes, the exercise of which is allegedly immune from the *Erie* concerns.

However, there is no "inherent power" to shift the entire burden of attorneys' fees except the narrow common law exceptions to the general American rule recognized by this Court in *Alyeska*. "Inherent powers" are those that are absolutely essential for a court to function. The "bad faith" exception does not find its roots in strict functional necessity, but rather in the "necessity" of the court to do equity between the parties. Federal courts are armed with a panoply of devices (none of which were used in this case), some expressed in rules and other perhaps inherent, to protect themselves from abuse and to vindicate their authority. Given the existence of these weapons, the power to shift attorneys' fees is not "necessary" as a device to combat abuse, and therefore can not be "inherent." In fact, the existence of express powers to sanction abuse circumscribes any roving "inherent" power to shift fees, at least in cases where the express powers have not even been invoked so that their adequacy could be tested. Simply put, when the express sanctions powers are invoked, and invoked properly, there is no need for any "inherent" power to shift attorneys' fees. A massive post-judgment retributive fee shift under the court's "inherent power" is not a desirable substitute for the proper use of the express sanction powers to correct abuse because the former serves no educational function, it triggers due process concerns, and it does not deter future abuse. It turns the court's power to "sanction" into an instrument of retribution, which does nothing except serve to chill legitimate zealous advocacy.

## ARGUMENT

### A. THE LOWER COURTS' AWARD OF ATTORNEYS' FEES CANNOT BE SUSTAINED ON THE BASIS OF THE "BAD FAITH" EXCEPTION TO THE GENERAL AMERICAN RULE AGAINST FEE SHIFTING.

The general American rule regarding attorneys' fees is that each party shall bear his or her own, a rule which displaces any "roving authority" to assess attorneys' fees "whenever the courts might deem them warranted." *Alyeska Pipeline Service Company v. Wilderness Society, supra,* 421 U.S. at 260, 95 S.Ct. at 1623. The circumstances under which attorney's fees are to be awarded "are matters for Congress to determine." Therefore, the "courts are not free to fashion drastic new rules" with respect to attorney's fees. *Id.*, 421 U.S. at 262, 269, 95 S.Ct. at 1624, 1627.

*Alyeksa* did not announce a new rule. The American Rule was so "well-engrained" by 1796 that in that year this Court "remarked that although the practice might not be strictly correct, it was the general practice of the United States and one that was entitled to the respect of the court, till it is changed, or modified, by statute." Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System* 61 N.C.L.R. 613, 616 (1983), citing *Arcambel v. Wiseman,* 3 U.S. (3 Dall.) 306 (1976). The rule against fee shifting was "firmly entrenched" by the time this Court held that a federal statute providing for the assessment of standardized costs was the exclusive vehicle for the recovery at law of attorneys' fees. Note, *Awards of Attorneys' Fees in the Federal Courts,* 56 St. John's L. R. 227, 279 (1982), citing *The Baltimore,* 75 U.S. (8 Wall.,) 377 (1896).

This in not to say that under certain "limited circumstances" federal courts do not possess the "inherent power" to award attorneys' fees absent legislative authority. Fees may be shifted under certain guardedly circum-



scribed judicially recognized common law exceptions to the general American rule, one of which is upon a finding of bad faith, vexatious or oppressive conduct. *Id.,* at 421 U.S. 257-59, 95 S.Ct. at 1621-1623. Indeed, there have been many situations where this Court has recognized the "bad faith" exception, and has granted attorneys' fees in federal question cases. *See, e.g., Roadway Express, Inc. v. Piper,* 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) (civil rights case); *F. D. Rich Company, Inc., v. United States for Use of Indus. Lumber Co., Inc.,* 417 U.S. 116, 94 S.Ct. 2157, 40 L.Ed.2d 703 (1974)(Miller Act case); *Hall v. Cole,* 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 1263 (1973)(LMRBA Case); *Newman v. Piggie Park Enterprises, Inc.,* 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968)(civil rights case); *Fleischmann Distilling Corp. v. Maier Brewing Company,* 386 U.S. 714, 87 S.Ct. 1404, 18 L.Ed.2d 475 (1967)(LANHAM Act case);

*Vaughan v. Atkinson,* 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed.2d 88 (1962)(admiralty case).

However, federal courts are not free to apply this common law exception in every case. As this Court noted when it first expounded upon the existence and nature of the "bad faith" exception:

> A very different situation is presented when a federal court sits in a diversity case. "[I]n an ordinary diversity case where the state law does not run counter to a valid federal statute or rule of court, and usually it will not, state law denying the right to attorneys' fees or giving a right thereto, which reflects a substantial policy of the state, should be followed."

*Alyeska Pipeline Service Company v. Wilderness Society, supra,* 441 U.S. at 259 n.31, 95 S.Ct. at 1622 n.31.

Accordingly, with the sole exception of the case *sub judice,* the federal trial and appellate courts have consistently applied this Court's statement in *Alyeska,* and have held that in a diversity case, attorney's fees cannot be awarded on the basis of the court's inherent power under the "bad faith" exception unless that exception is recognized by the applicable state law. *See First State Underwriters Agency of New England Reinsurance Corp. v. Travelers,* 803 F.2d 1308, 1317 (3rd Cir. 1986), finding that Pennsylvania's "bad faith" exception governed the award of attorney's fees in a diversity contract action; *Nepera Chemical, Inc. v. Sea-Land Service, Inc.,* 794 F.2d 688 (D.C. Cir. 1986) applying District of Columbia law in a diversity action to determine whether attorney's fees could be awarded as punishment for bad faith, vexatious, wanton or oppressive behavior; *Amey, Inc. v. Gulf Abstract & Title, Inc.,* 758 F.2d 1486, 1508 (11th Cir. 1985), *cert. denied,* 476 U.S. 1153, 106 S.Ct. 2267, 90 L.Ed.2d 712 (1986), rejecting a claim for attorneys' fees predicated upon the "bad faith" of the plaintiff in the way it "initiated and conducted" the litigation because the "bad faith exception is not recognized in the Florida jurisprudence;" *Barton v. Drummond Co.,* 636 F.2d 978, 985 (5th Cir. 1981), finding that federal law did not control the issue of whether attorneys' fees were awardable for bad faith conduct in the course of, and prior to, the litigation because the case was a diversity action, but concluding that attorney's fees were authorized by Alabama Law; *Perkins State Bank v. Connolly,* 632 F.2d 1306, 1310, 1312 (5th Cir. 1980), holding that the inherent power of a federal court to shift fees under the "bad faith" exception does not supersede state law in a diversity case, and reversing an award of attorneys' fees made under the "bad faith" exception because it was not authorized by Florida law; *Lewis v. S.L. & E., Inc.,* 629 F.2d 764, 773 n.21



(2d Cir. 1980), reversing an award of attorneys' fees made on the basis of the "bad faith" exception because New York law did not authorize the award; *Montgomery Ward & Company, Inc. v. Pacific Indemnity Company, supra,* holding that attorney's fees could not be awarded under the "bad faith" exception unless that exception was recognized by Pennsylvania law; *Tryforos v. Icarian Development Company, S.A.,* 518 F.2d 1258 (7th Cir. 1975), *cert. denied,* 423 U.S. 1091, 96 S.Ct. 887, 47 L.Ed.2d 103 (1976), noting that the "unquestioned power" of a federal court to award counsel fees to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons could not be exercised by a federal court in a diversity case unless such an exercise is permitted by state law. *See also City of Philadelphia v. Fidelity and Deposit Company of Maryland,* 1987 WL 15432 (E.D. Pa. 1987), recognizing that Pennsylvania, not federal, law controlled on the question of whether attorney's fees could be awarded under the "bad faith" exception; *Miller v. Cudahy Company,* 656 F.Supp. 316, 336 (D.C. Kan. 1987), *aff'd in part,* 858 F.2d 1449 (10th Cir. 1988), recognizing that state law controlled the awardability of attorneys' fees in diversity cases under the "bad faith" exception, but noting that Kansas had no rule of law on the subject; *Watson v. Ferguson,* 1986 WL 5202 (N.D. Ill. 1986), applying Illinois' statutory version of the "bad faith" exception because "a federal court sitting in diversity should apply state statutes" regarding attorneys' fees; *William Shapiro v. American Home Assurance Company,* 1985 WL 3033 (E.D. Pa. 1985), examining Pennsylvania law for application of the "bad faith" exception because "as this is a diversity case, any award of attorney's fees must have a basis in the law of the relevant state;" *Brady v. Hartford Fire Insurance Company,* 610 F.Supp. 735 (D.C. Md. 1985), applying Maryland's version of the "bad faith" exception in a diversity case; *Friends of All Children, Inc. v. Lockheed Aircraft Corporation,* 587 F.Supp. 180, 188 (D.C.D.C. 1984), *aff'd,* 746 F.2d 816 (D.C. Cir. 1984), refusing to award attorneys' fees under the "bad faith" excep-

tion because "jurisdiction in these cases is by diversity, . . . and the law of the District of Columbia does not now appear to permit an award of attorneys' fees even under the extreme circumstances alleged here;" *P. Liedtka Trucking, Inc. v. James H. Hartman and Son, Inc.* 537 F. Supp. 381, 382 n.1 (E.D. Pa. 1982). *aff'd,* 709 F.2d 1491 (3rd Cir. 1983), applying the statutory version of the "bad faith" exception contained within Pennsylvania law because "where state law provides such a right, attorneys' fees may be assessed by a federal court in a diversity case;" *Chicago Regional Fort District v. Ferroslag, Inc.,* 531 F.Supp. 401, 401-02 (N.D. Ill. 1982), holding that the court was not "free to exercise its 'inherent power' to tax a party with fees on the basis" of the bad faith exception because "Illinois not federal law provides the rule of decision;" *Bass v. Spitz,* 522 F.Supp. 1343, 1358 n.28 (E.D. Mich. 1981), rejecting a claim for attorneys' fees for defense of a state law diversity claim made under the "state law counterpart of the 'bad faith' exception" because the court found "no Michigan statute or court rule which would authorize recovery of attorney's fees on this basis;" *McKinney v. Gannet Co., Inc.,* 660 F. Supp. 984, 1025 (D.C.N.M. 1981), *appeal dismissed,* 694 F.2d 1240 (10th Cir. 1982), refusing to award attorney's fees under the "bad faith" exception because it "has not been adopted in New Mexico."

In the instant case, there was no room for a finding, as was made in some of the cases cited above, that the "bad faith" exception was recognized and applied by the law of the forum state. The Court of Appeals correctly noted that Louisiana does not recognize the "bad faith" exception and steadfastly will not allow fee shifting in the absence of statute or contract, even through use of the "inherent power" of the court. (App., 67a). *See also Marvirazon Compania Naviera, S.A. v. H. J. Baker & Brothers, Inc.* 674 F.2d 364, 368 (5th Cir. 1982); *Quealy v. Paine, Webber, Jackson & Curtis, Inc.,* 475 So.2d 756, 763 (La. 1985). Louisiana does not award attorneys' fees for "bad faith" breach of contract. *See Ogea v. Loffland Brothers Company,* 622



F.2d 186, 190 (5th Cir. 1980); *Rutherford v. Impson,* 366 So.2d 944, 947 (La. App. 1st Cir. 1978), *writ denied,* 369 So.2d 140 (La. 1979). The only measure of damages is "the loss sustained by the obligee and the profit of which he has been deprived." La. Civ. Code art. 1995 (1984). Moreover, the underlying rationale of the "bad faith" exception, which is punishment, *Hall v. Cole, supra,* 412 U.S. at 5, 93 S.Ct. at 1946, is inconsistent with Louisiana's prohibition of punitive damages. *Baggett v. Richardson,* 473 F.2d 863, 865 (5th Cir. 1973).

Given the wealth of authority on point, at every level of the federal judiciary from its very top to the bottom, the decision of the Court of Appeals should have been a preordained *per curiam* reversing the trial court's grant of attorneys' fees under the "inherent power" of the court to shift fees under the "bad faith" exception to the general American rule. Every court that has ever considered the question has held that state law controls, and has either refused to shift fees because state law did not recognize the "bad faith" exception, or has shifted fees upon a finding that state law did recognize the "bad faith" exception. No court has ever shifted fees under the "bad faith" exception after an express finding that this exception was not recognized under the relevant state law.

But, with the comment that this Court "confused" the issue in *Alyeska,* the Court of Appeals, with no authority whatsover,[2] dispensed with *Alyeska* and its mountainous progeny, upon a rumination that this Court did not

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[2] The Court of Appeals states that federal courts have not been "even in their treatment of the issue."(Pet. App., 73a) The *concurring* opinion by Judge Gibbon in *Montgomery Ward & Co., Inc. v. Pacific Indenmity Co., supra,* and the *magistrate's* opinion in *Republic of Cape Verde v. A & A Partners,* 89 F.R.D. 14 (S.D.N.Y. 1980), the only two cases cited by the Court of Appeals in support of its holding, hardly supply succor for this statement. Moreover both of these views are pure *dictum* because both Judge Gibbons and the magistrate preceded their ruminations with a finding that state law authorized an award of attorneys' fees.

"intend" what it plainly said. (Pet. App., 67a-68a) But, the "plain meaning" of *Alyeska* is that state law governs attorney's fee awards in diversity actions, even in cases of bad faith litigation. *Montgomery Ward & Co., Inc. v. Pacific Indemnity Co., supra* 557 F.2d at 56. See *also* Mallor, *supra*, at 631 n.127 (In diversity cases, a federal court is to follow the state rule with regard to attorneys' fees for bad faith litigation). While "stare decisis does not mandate that earlier decisions be enshrined forever, of course, it does counsel that [the Court] use caution in rejecting established laws." *Walker v. Armco Steel Corporation*, 446 U.S. 740, 749, 100 S.Ct. 1978, 1984, 64 L.Ed.2d 659 (1980). The lower courts' complete disregard for *Alyeska* and its progeny hardly meets the "heavy burden" of supporting a reconsideration of an established line of jurisprudence, *id.*, as will be demonstrated below.

## B. THE LOWER COURTS' AWARD OF ATTORNEYS' FEES CANNOT BE SUSTAINED ON THE BASIS OF THE "INHERENT POWER" OF THE COURT

Finding no solace for its decision in the "bad faith" exception to the General American Rule regarding attorney's fees, the lower courts turned to the "inherent power" of the courts and "sanctioned" Chambers by shifting the entire burden of attorneys' fees. Without citation of authority, the Court of Appeals espoused the view, "nigh unchallenged in the history of the country, that federal courts have inherent power to police themselves by civil contempt, imposition of fines, the awarding of costs, and the shifting of fees." (Pet. App. 68a). It was this power that was invoked by the lower court to shift the entire burden of attorneys' fees in this case. The Court of Appeal held that the use of this power was not limited by *Erie* because the shifting of fees under the inherent power of the court was "not a matter of substantive remedy, but of vindicating judicial authority." (Pet. App. 77a)



### 1. THERE IS NO "INHERENT POWER" TO SHIFT THE ENTIRE BURDEN OF ATTORNEY'S FEES OTHER THAN THE INHERENT *EQUITABLE* POWER RECOGNIZED IN *ALYESKA*.

It is beyond peradventure that federal courts possess certain "inherent powers." These are the powers that "are necessary to the exercise of all others," *Roadway Express, Inc. v. Piper, supra*, 447 U.S. at 764, 100 S.Ct. at 2463, that is, those "necessary to permit the courts to function." *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 819, 107 S.Ct. 2124, 2144, 95 L.Ed.2d 740 (1987) (Scalia, J., concurring), *citing United States v. Hudson*, 7 Cranch 32, 3 L.Ed. 259 (1812). These powers include the contempt power, *Cooke v. United States*, 267 U.S. 517, 539, 45 S.Ct. 390, 395, 69 L.Ed. 767 (1925), and the power to dismiss a claim *sua sponte* for lack of prosecution, *Link v. Wabash Railroad Company*, 370 U.S. 626, 632, 82 S.Ct. 1386, 1389, 8 L.Ed.2d 734 (1962).

The "inherent powers" belong to three tiers: (1) irreducible inherent power that derives from Article III of the Constitution; (2) absolutely essential powers that arise from the nature of the court; and (3) powers that are necessary only in the sense of being useful. Powers of the first tier are available to the courts even in the face of contrary legislative direction. The second tier represents powers which can be legislatively regulated, but not abridged or abrogated. To the third tier belong powers which can be exercised only in the absence of contrary legislative direction — they exist at legislative whim. This last category is composed of powers that are necessary, but "necessary" only "in the practical sense of being useful." *See Eash v. Riggins Trucking Company*, 757 F.2d 557, 562-63 (3rd Cir. 1985) (en banc).

While this Court has not formally classified the "inherent powers," it has nonetheless made it clear

that the power to shift attorney's fees is of the third tier. In *Alyeska Pipeline Company v. Wilderness Society, supra*, this Court expressly recognized that "the circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine." 421 U.S. at 262, 95 S.Ct. at 1624. The "inherent power" to shift fees, such as under the "bad faith" exception, only exists "unless forbidden by Congress." 421 U.S. at 359, 95 S.Ct. 1622. Indeed, integral to the formal recognition given to the "bad faith" exception in *Alyeska* was Congress' long forbearance with regard to the practice, which was viewed as a sign of tacit acceptance and approval. 421 U.S. at 260; 95 S.Ct. at 1623. The "bad faith" exception only exists because Congress is deemed to have acquiesced in its use. Note, *Awarding Attorneys' Fees Against Attorneys*, 60 B.U.L.R. 950, 958 n.2 (1980), *citing Cordeco Development Corporation v. Vasques*, 539 F.2d 256, 263 n. 11 (1st Cir.), *cert. denied*, 429 U.S. 978, 97 S.Ct. 488, 50 L.Ed.2d 586 (1976).

Given that the power to shift fees, even under the "bad faith" exception, is one that can be regulated by Congress, it is not surprising that it finds its source and purpose in something other than its own strict functional "necessity," as was found by the Court of Appeals. (Pet. App., 69a).

> This third category of inherent posers has sometimes been said to be "rooted in the notion that a federal court, sitting in equity possess all of the common law equity tools of a Chancery Court (subject, of course, to congressional limitation) to process litigation to a just and equitable conclusion. . . .[S]uch power is necessary only in the sense of being highly useful in the pursuit of a just result.

*Eash v. Riggins Trucking Company, supra*, 757 F.2d at 563, *citing ITT Community Development Corporation v. Barton*, 569 F.2d 1351, 1359 (5th Cir. 1978). The power can



be traced to 17 Rich. II, c.6, which provided that the Chancellor should award damages (including costs) according to his discretion against persons bringing vexatious and unfounded suits in chancery. This power was thought to be "so far inherent in the equity court as to be inseparable from the exercise of its judicial authority." Therefore, "from the beginning" chancery courts were imbued with the "inherent power" to award fees for suits that were "false, unjust, vexatious, wanton, or oppressive." Battey, *Rule 11 Sanctions: Some Current Observations*, 33 S.D.L.R. 207, 207 & n.2 (1987-88), *citing Guardian Trust Co. v. Kansas City Southern Ry. Co.* 28 F.2d 233, 240-41 (8th Cir. 1921). The federal court's power to award attorney's fees for bad faith conduct "is part of the original authority of the chancellor to do equity in a particular situation. . . ." *Hall v. Cole, supra*, 412 U.S. at 5, 93 S.Ct. at 1946. *See also Alyeska Pipeline Services v. Wilderness Society, supra*, 421 U.S. at 279-80, 95 S.Ct. at 1632-33 (Brennan, J. dissenting), *citing Vaughan v. Atkinson, supra;* Note, *Awards of Attorneys' Fees in the Federal Courts*, 56 St. John's L.R. 277, 279 n.5 (1982). *See generally* Comment, *Attorneys' Fees and the Federal Bad Faith Exception*, 29 Hast. L.J. 319, 321-325 (1977), and Comment, *Attorney Fee Shifting: The Sanctioning Power of Section 1927 of Title 28, United States Code* 9 N. Ill. L.R. 393, 360-400 (1989), for a discussion of the history of the American Rule and the "bad faith" exception thereto.

Apart from the long standing inherent *equitable* power of a court to shift attorneys' fees to compensate a party injured by the vexatious conduct of his adversary, which only exists by virtue of its tacit legislative acceptance, there is no other "inherent power" authorizing a post-trial shift of the entire burden of attorneys' fees, such as some vague inherent power of a court to "police itself from abuse" or to "vindicate its own authority," as was held by the Court of Appeal.[3] That much is clear from this

[3] The question of whether there is an "inherent power" to sanction a

Court's decision in *Roadway Express, Inc. v. Piper, supra.* There, this Court held that attorney's fees could not be assessed against obdurate counsel for discovery abuses under the "excess cost" provision in 28 U.S.C. § 1927. Of more interest, however, was the Court's suggestion that the attorneys' fees could be assessed under the court's "inherent power." However, this "inherent power" was not held to a limitless reservoir of authority to assess attorneys' fees anytime a court feels it necessary to vindicate its own authority or to police itself. Rather, this Court specifically held that, even through courts possess the inherent powers "necessary to the exercise of all others," and to exert the "control necessarily vested in courts to manage their own affairs," such "inherent powers" are nonetheless limited by the general American Rule, and the courts may only shift fees upon a finding of "bad faith" under the exception to the general Rule, "a finding that would have to precede any sanction under the court's inherent power."447 U.S. at 767, 100 S.Ct. at 2465. Properly viewed, then, *Roadway Express* did not announce the existence of a broad bank of "inherent powers" that include the ability to shift attorneys' fees to "vindicate judicial authority." To the contrary, *Roadway Express* was a strong reaffirmation of the viability of the American Rule, and the limit that the Rule imposes upon the "inherent powers" of a court. "To authorize the award of attorneys' fees against plaintiff's lawyers in *Roadway Express,* the Supreme Court relied upon the inherent disciplinary power

Footnote 3 continued

litigant or his or her counsel for specific excesses that may transgress the bounds of acceptable behavior by awarding to his or her opponent the attorneys' fees incurred due to the excess immediately upon discovery of the infraction is not before the Court in this case, and Chambers takes no position on that issue. However, he does suggest that if such "inherent power" exists, there are logical and compelling reasons to limit the power by requiring that it be exercised consistently with the principles that govern the imposition of sanctions under the express sanctioning authority of a court, such as Rule 11. *See* 29-41, *infra.*



of federal courts, which *Alyeska* confined to the traditional exceptions to the American Rule. *Roadway Express'* award of attorneys' fees falls within the bad faith exception." Note, *Awarding Attorneys' Fees Against Attorneys,* 60 B.U.L.R. 950, 958 (1980). *See also* Note, *The Federal Courts' Authority to Assess Attorneys' Fees Directly Against Counsel — Roadway Express v. Piper,* 30 DePaul L.R. 669, 682 (1981), noting that this Court's use of "inherent power" to award attorneys' fees was no more than an application of the "bad faith" exception because it limited "this sanction to *willful* abuses of the judicial process."[4]

Accordingly, courts do not possess inherent power *carte blanche* to shift the entire burden of attorneys' fees as a matter of procedural or judicial efficiency. The general American Rule recognized and applied in *Alyeska* imposes the same limitation on that power as it does upon the power to shift attorneys' fees as a matter of substantive remedy. *Roadway Express* makes that clear. *See also Tiedel v. Northwestern Michigan College,* 865 F.2d 88, 93 (6th Cir. 1988). In either case, such rulemaking is beyond the judicial sphere, and properly belongs to the legislature, as this Court properly recognized in *Alyeska.* It was only the court's inherent *equitable* power to shift attorneys' fees under the "bad faith exception" that authorized the sanction in *Roadway Express.* That equitable power was not available in this diversity case.

4. The "inherent power" invoked in *Roadway Express* under the "bad faith exception" is far short of that wielded in the instant case. Here, Chambers has been assessed every penny of NASCO's attorneys' fees, regardless of its relationship to the alleged offenses. In *Roadway Express,* Justice Blackmun noted in concurrence: "Most significantly, [the Court] does not address the permissibility of applying [the bad faith exception] to award attorney's fees beyond those actually attributable to the culpable attorneys' vexatious actions." 447 U.S. at 769 n. 2, 100 S.Ct. at 2465 n. 2.

## 2. COURTS DO NOT NEED THE INHERENT POWER TO SHIFT THE ENTIRE BURDEN OF ATTORNEY'S FEES IN ORDER TO PROTECT THEMSELVES FROM ABUSE.

There is even less reason at present to recognize the type of "inherent power" weaved by the Court of Appeal from whole cloth than there was at the time *Roadway Express* rejected such a sweeping view and limited the court's "inherent power" to shift fees to the "bad faith exception." Inherent powers are limited to those that are "necessary for the exercise of all others," *Roadway Express, Inc. v. Piper, supra,* 447 U.S. at 764, 100 S.Ct. at 2463, or those essential "to permit the courts to function." *Young v. United States ex rel. Vuitton et fils, supra,* 468 U.S. at 819, 107 S.Ct. at 2144. Courts do not need the ability to "sanction" litigants by a massive post-trial shift of the entire burden of attorney's fees. Several express powers have been granted since *Roadway Express* was decided that more than adequately arm the courts.

First, 28 U.S.C. § 1927 has been amended to expressly authorize an award of "attorney's fees reasonably incurred" because of abusive conduct. Imposition of sanctions against counsel under this provision far better equips the court to combat abuse than does a fee shift against his or her client under the court's "inherent power." The assessment of attorneys' fees against counsel provides a court with a "powerful weapon" to discourage dilatory tactics. McIlvine *A District Judge's Views as to the Means of Insuring Compliance by Counsel with Pre-trial Procedures.* 29 F.R.D. 408, 413.
Sanctioning attorney misconduct furthers the deterrence objective "more effectively than an award against a party" because "the attorney, not the party, is in a better position to analyze the merits of a claim and determine whether it has a legal basis." Note, *Awarding Attorneys' Fees Against Attorneys,* 60 B.U.L.R. 950, 959 (1980).[5]

[5] Moreover, courts always possess the inherent authority to discipline



Second, "[s]anctions came into their own in the 1983 amendments to the Federal Rules of Civil Procedure. Explicit authority to impose money sanctions, against lawyers as well as their clients, was written into rules 11, 16, and 26, and sanctions were made mandatory for violating rule 11 and 26." Nelkin, *Sanctions Under Amended Federal Rule 11 — Some "Chilling" Problems in the Struggle Between Compensation and Punishment,* 74 Geo. L.J. 1313, 1313 (1986). These amendments "set the framework for a comprehensive system of sanctions to reach a wide array of litigation misconduct." Maute, *Sporting Theory of Justice: Taming Adversary Zeal with a Logical Sanctions Doctrine,* 20 Conn. L.R. 7, 21 (1987). The court's arsenal has been filled with a panoply of sanctions which may be levied for oppressive conduct short of a full shift of the entire burden of attorney's fees. *See* FRCP 11, 16(f), 26(g), 30(g), 37(d), 37(g), 56(g). In particular, the amended Rule 11 is "the judiciary's most powerful weapon in the war against unnecessary and frivolous trial practice." Bloomstein, *Developing Standards for the Imposition of Sanctions Under Rule 11 of the Federal Rules of Civil Procedure,* 21 Akron L.R. 289, 243 (1988). "If the amended procedural standards are diligently enforced as part of a comprehensive system of sanction authority, substantial changes in the ethic of zealous advocacy can be expected." Maute, *supra,* at 23. This comprehensive system is better protection for the court from abuse of its processes than a post-trial massive fee shift under the court's "inherent power" because "the key to avoiding abuse of the litigation process is early and effective judicial management." Schwarzer, *Sanctions Under the New Federal Rule 11 — a Closer Look,* 104 F.R.D. 181, 204. The amendments, when used in conjunction with each other, "provide an adequate set of tools for the early disposition of frivolous claims and defenses." Schwarzer, *Rule 11*

*(footnote 5 continued)*
*attorneys by suspension or disbarment because of their status as officers of the court. In re Snyder,* 472 U.S. 634, 105 S. Ct. 2874, 86 L.Ed.2d 504, 512 (1985).

*Revisited*, 101 Harv. L.R. 1013, 1019 (1988).

The sanction scheme effected by the above discussed amendments adequately equips the courts with all that is necessary to police themselves against abuse.[6] In fact, it was the specific purpose of the authors of the scheme to "expand" the existing "equitable doctrine" employed in *Roadway Express* by eliminating the subjective "bad faith" requirement. *See* Burbank, *Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power*, 11 Hof. L.R. 997, 1001 (1983). Given the comprehensiveness of the scheme, the express powers granted to the courts should be viewed not only as a displacement of the vague and nebulous "inherent powers" that might have previously existed, but also as a circumscription of those powers. *See, e.g., Society Internationale pour Participations Industrielles et Commerciales, S.A. v. Rogers*, 357 U.S. 197, 207, 78 S.Ct. 1087, 1093, 2 L.Ed.2d 1255 (1958), where this Court noted that "whether a court has power to dismiss a complaint because of noncompliance with a production order depends exclusively upon Rule 37" and that "[r]eliance upon . . . 'inherent power' can only obscure analysis of the problem." As one court observed:

> [Fee shifting] absent legislative action first to declare that the trial court has inherent power to impose such sanctions [is] a giant step in expanding the power of the court with sweeping ramifications. Such power in the trial court, unfettered and unbridled, without appropriate safegards and guidelines, could cancel out any benefits derived through the judicial process by generating a proliferation of appeals. We are therefore of the view that any power of the trial court to impose such sanctions should be created by the legislative branch of government with appropriate safeguards and guidelines developed following a thorough in depth investigation.

6. Even in circumstances not covered by these express provisions, the courts are not defenseless. They certainly possess the inherent power to levy non-monetary sanctions, such as contempt and the dismissal of frivolous claims or defenses. *Cooke v. United States, supra; Link v. Wabash Railroad Co., supra.* Moveover, they may possess the inherent power to levy monetary sanctions when that sanction is "tied to specific costs that [bear] a direct relationship to the alleged misconduct and thus [offers] a nexus and a limit." *Eash v. Riggins Trucking, Inc.*, 757 F.2d at 565. The "sanction" levied in the instant case was not so limited.



*Young v. Redmond*, 128 Cal. Rptr 86, 93-94 (Cal. App. 1976). *See also* Cogan *The Inherent Power and Due Process Models in Conflict* 42 § W.L.J. 1011, 1020 (1989), criticizing the Fifth Circuit's overuse of "inherent power" for sanctioning litigants, and noting that, "Legislatures should participate in deciding the general rules that govern the kind of sanctions imposed and the methods by which they are imposed upon litigants. . . . . Proper reliance upon the express sanction powers will lead to a more "balanced approach" to the "litigation problems [they] address" and "will avoid excesses that would indeed pose the risk of negative side effects." Levin & Sobel, *Achieving Balance in the Developing Law of Sanctions*, 36 Cath. U.L.R. 587, 588-89 (1987). Courts should be confined to the express powers when adequate in order to promote uniformity, and because such express powers provide guidance to both the bench and bar. *See* Comment, *The Misuse of Inherent Powers When Imposing Sanctions for Discovery Abuse: The Exclusivity of Rule 37*, 9 Cardozo L.R. 1779 (1988).

### 3. USE OF INHERENT POWER TO SHIFT THE ENTIRE BURDEN OF ATTORNEYS' FEES, EVEN IF ON PROCEDURAL GROUNDS, IS LIMITED IN DIVERSITY ACTIONS BY *ERIE* AND ITS PROGENY.

In the case below, the trial court could not have found the need to impose the sanction of attorneys' fees in order to vindicate its judicial authority. At the time the award at issue was finally made, fifteen months after a

final decision on the merits, the court did not need vindication — its work was done, and it had not found the need to sanction anyone while that work was being accomplished, except for contempt citation. The record shows that the trial court was very well aware of its power to impose sanctions, and it found that use of this power was unnecessary. Warnings and the shaping of issues had been sufficient to police itself against abuse and vindicate its authority. It was only the mention by the Court of Appeals in its remand order of the possibility of sanctionable conduct that spurred the trial court to decide that sanctions were indeed in order. Then, it dredged up six years of conduct long under the bridge, and punished Chambers for all of it. Given the course of this proceeding, it is difficult to understand the Court of Appeals' attempt to justify the award of attorney's fees made by the trial court under the "inherent power" of the court to "control its courtroom." (Pet. App. 77a). Having foregone use of the panoply of sanctions available to it to stop the abuses that it perceived were occurring during the course of the litigation, it is less than clear how the trial court's imposition of the $1,000,000 "sanction" of NASCO's full breadth of attorney's fees was a matter of the strict "functional necessity" that the Court of Appeals found is at the heart of a court's "inherent powers."(Pet. App. 69a).

The assertion that the lower court "needed" the power to levy the massive post-judgment "sanction" imposed in this case does nothing but prove that the real object of its scorn was not abuse of the procedural processes, but rather the pre-trial conduct of Chambers in refusing to perform the Purchase Agreement without a valid defense and his role in the creation of the Public Records Doctrine defense.[7] Procedural abuses could have been remedied by a

7. There is not one shred of evidence in the record of this case that Chambers made any decision other than to breach the Purchase Agreement, offer to pay damages, and accept this attorney's advice to attempt the Public Records Doctrine Defense. In fact, the only evidence in the record on the point is that Chambers left all decisions regarding



swift invocation of the numerous sanction provisions contained in the Federal Rules of Civil Procedure, particularly Rule 11. Yet, according to NASCO, the "malefaction" for which Chambers is being punished was beyond the reach of the Rule because it "did not involve the signing of papers filed in conjunction with this litigation." Brief in Opposition to Petition for Certiorari, at 6 n.3. What *procedural* abuses could have occurred that did not involve the signing of papers? The massive post-judgment award that included reimbursement of every penny of attorney's fees incurred by NASCO cannot by any stretch be viewed as "necessary" unless its real purpose was to compensate NASCO and punish Chambers for bad faith breach of contact and his participation in the creation of the Public Records Doctrine defense, acts which both predated the filing of this suit.[8] Contrary to the Court of Appeal's suggestion that the award made in this case was not a matter of "substantive remedy," but rather an instrument of judical vindication, "[a]n award of attorney's fees for bad faith that constitutes a part of the underlying cause of action represents a compensatory award, rather than a punitive award to deter frivolous litigation." Note, *Awarding Attorney's Fees Against Attorneys* 60 B.U.L.R. 950, 959 n. 87 (1980). *See also Marek v. Chesny,* 473 U.S. 1, 35, 105 S.Ct. 3012, 3030, 87 L.Ed.2d (1985)(Brennan, J., dissenting)("The right to attorneys' fees is 'substantive' under any reasonable definition of that term.") Unquestionably, such a compensatory award would trigger *Erie* concerns, especially given Louisiana's abhorrence for punitive

(footnote 7 continued)
the procedure of the litigation up to his lawyers. This is the substance of Chambers' uncontradicted testimony presented at the sanctions hearing. (J.A. 93)

8. Chambers' desire to litigate about his obligation to specifically perform the Purchase Agreement, while constantly offering to pay damages, can hardly be bootstrapped into an abuse of the court's processes. "Clearly, the exercise of one's legal rights to have a dispute resolved in Federal Court is not an abuse of the judicial process." *Indianapolis Colts v. Mayor and City Council,* 775 F.2d 177, 182 (7th Cir. 1985).

damages.[9]

Even if there is a procedural component to the attorney's fee award made in this case, the specter of *Erie* still looms large. A cursory review of the district court's opinion will reveal that in its view there was an inextricable interconnection between the "bad faith" that led to this lawsuit and the "bad faith" that occurred in the manner in which it was conducted. The district court's repeated frame of reference is the "very first act of conspiracy"—the "initial fraud" of the Public Records Doctrine defense. (Pet. App. 9a, 23a, 51a). This is not surprising since NASCO itself asserted in its Motion for Sanctions that, "[t]he indelible taint of the initial fraud pervades these proceedings, thus rendering sanctionable every step taken thereafter by respondents, even if some of those steps, standing alone, may appear legitimate." (R2644). The significant (if not exclusive) role that the "bad faith" breach of the contract and the Public Records Doctrine defense plays in the sanction at issue is more than sufficient to trigger the Rules of Decision Act's mandate that state law control. 28 U.S.C. § 1652.[10]

> The same considerations which formed the foundation of *Hanna* and the line of cases following *Erie* would apply, of necessity, were a federal court to engraft federal notions of attorneys' fees awards onto state substantive rights tried in a diversity action. It is apparent that permitting an award of attorneys' fees in a federal court but denying them for an identical action brought in a state court would represent a significant reason to choose a federal forum. Even if we assume that this difference could be restricted to cases involving obdurate conduct or bad faith, it is clear that the possibility of such an award in many cases would color the substantive aspects of the case and could significantly alter the legal theories presented by the parties as a claim or defense. Under *Erie* and *Hanna*, such a federal shaping of the state substantive right is unwarranted.

*Ward & Company v. Pacific Indemnity Co., supra*, 557 F.2d at 58 n.9 (3rd Cir. 1977), *citing Hanna v. Plummer*, 380 U.S. 460, 471-72, 85 S.Ct. 1136, 1144, 14 L.Ed.2d 8 (1965).[11] Thus, the Court of Appeal erred when it tossed *Erie* aside on the mere finding that the *purpose* of the sanction at isue was to 'vindicate judicial authority" rather than to grant a "substantive remedy." This conclusion is flawed both factually and legally.

## 4. RELIANCE UPON "INHERENT POWER" TO SANCTION LITIGANTS BY A POST-TRIAL SHIFT OF THE ENTIRE BURDEN OF ATTORNEY'S FEES IS NOT ONLY UNNECESSARY, BUT ALSO COUNTER-PRODUCTIVE.

The award made in this case is at cross purposes with the proper exercise of a court's inherent power to manage its own docket, promote efficiency, and deter abuses of process. The massive post-judgment, untailored and unfocus-

9. NASCO received all that Louisiana law allows — specific performance and damages for the delay.

10. This is not a case where the issue is whether a state rule should be applied in lieu of a Federal Rule of Civil Procedure, which would be governed by the Rules Enabling Act. 28 U.S.C. 2072. Thus, the *Sibbach v. Wilson Co.*, 312 U.S. 1, 61 S.Ct. 422, 85 L.Ed.2d 479 (1941), and *Burlington Northern R.R. v. Woods*, 480 U.S. 1, 107 S.Ct. 967, 94 L.Ed.2d 1 (1987), rule that federal iaw controls any issue that even remotely might be considered procedural has no application.



11. The mere fact that there may be procedural aspects to the sanction does not insulate it from *Erie's* concern. Even state rules of "form and mode" must be applied by federal courts in diversity actions, "where the state rules may bear substantially on the question whether the litigation would come out one way in the federal court and another way in the state court if the federal court failed to apply the local rule." *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525. 536-37, 87 S.C.t. 893, 900, 2 L.Ed.2d 953 (1958).

ed aspects of the award made in this case render it both inappropriate and dangerous as a "sanction" imposed under the "inherent powers" of a court.

A distinction is to be drawn between the imposition of a "sanction" that requires a party to reimburse those attorney's fees attributable to some conduct below an appropriate standard, and the shifting of the entire burden of attorney's fees for the purpose of making the injured party whole. Sanction rules, such as Rule 11, "are not fee shifting statutes." *Cooter & Gell v. Hartmarx Corporation*, __U.S.__, 110 S.Ct. 2447, 2462, 58 USLW 4763 (1990). Their purpose is "not reimbursement, but sanction." *Pavelic & LeFlore v. Marvel Entertainment Group*, __U.S.__, 110 S.Ct. 456, 459, 58 USLW 4038 (1989). The line between the two may not always be clear. *See Oliveri v. Thompson*, 803 F.2d 1265, 1271 (2d Cir. 1986), *cert. denied*, 480 U.S. 918, 107 S.Ct. 1373, 94 L.Ed.2d 689 (1987)("There is no clear line between attorney's fees as damages and attorney's fees as sanctions.") Nonetheless, there are characteristics that distinguish a "sanction" from a shift of attorney's fees.[12]

A primary distinction is a question of timing:

> It is a precept that sanctions must be imposed within a time frame that has a nexus to the behavior sought to be deterred.... Sanctions should not amount to an 'accumulation of all perceived misconduct, from filing through trial,' resulting in 'single post-judgment retribution in

[12] While many of the observations that follow were made with regard to sanctions under Federal Rule of Civil Procedure 11, there is no reason why their compelling logic is not applicable to any sanction of attorney's fees imposed for the purpose of vindicating judicial authority or policing against litigation abuses. *See, e.g., Smith International, Inc. v. Texas Commerce Bank*, 844 F.2d 1193 (5th Cir. 1988), adopting the Rule 11 limitations for sanctions imposed under the authority of 28 U.S.C. §1927 for "bad faith" conduct by attorneys.



> the form of a massive sanctions award.' The most obvious defect in this procedure is that it flies in the face of the primary purpose of sanctions, which is to deter subsequent abuses. This policy is not well served by tolerating abuses during the course of an action and then punishing the offender after the trial is at an end.

*Thomas v. Captial Security Services, Inc.*, 836 F.2d 866, 881 (5th Cir. 1988) (en banc), *citing In re Yagman*, 796 F.2d 1165, 1183 (9th Cir. 1986), *cert. denied*, __U.S.__, 108 S.Ct. 450, 98 L.Ed.2d 390 (1987). "Early notice can deter continuing violations, thereby saving monetary and judicial resources." *Donaldson v. Clark*, 819 F.2d 1551 (11th Cir. 1987).

> A proper sanction assessed at the time of a transgression will ordinarily have some measure of deterrent effect on subsequent abuses and resultant santions. Such prompt action helps enhance the credibility of the rule, and, by deterring further abuse, achieve its therapeutic purpose.

*In re Yagman, supra*, 796 F.2d at 1183. *See also* Maute, *Sporting Theory of Justice: Taming Adversary Zeal with Logical Sanctions Doctrine*, 20 Conn. L.R. 7, 21-22, 61 (1987).

An unusually large post-judgment "sanction" is a sure sign of the failure of the sanctioning process to achieve deterrence, and of monetary and judicial waste. "If enforcement of the rule occurs expeditiously before much damage is done, . . monetary sanctions will ordinarily be modest." Schwarzer, *supra*, 104 F.R.D. at 203. But, when "abuses are allowed to pass unchecked, and, thus, undeterred," attorney's fees begin to accumulate. As a consequence, the court is "left faced with an unusually large sanctions amount that will, contrary to the policy, impart absolutely no deterrent value." The efficiency achieved by waiting to assess "sanctions" at the conclusion of the litigation is "paid for in wasted judicial resources and money." *In re*

Yagman, supra, 796 F.2d at 1183.

The second precept of sanctions is that, in order to achieve their educational and rehabilitative purpose, sanctions should be "tailored to the particular wrong." *Thomas v. Captial Security Services Inc., supra,* 836 F.2d at 877. Attorney's fees, when awarded as a sanction, "ordinarily will not include compensation for the entire case." *Mary Ann Pensiero, Inc. v. Lingle,* 847 F.2d 90, 99 (3rd Cir. 1988). The fees awarded must have been "reasonably incurred as a result of the violation." *Willy v. Coastal Corp.,* 855 F.2d 1160 (5th Cir. 1988). "It is crucial that a sanctions award be quantifiable with some precision and properly itemized in terms of the perceived misconduct and the sanctioning authority." *Brown v. Federation of State Medical Boards,* 830 F.2d 1429, 1438 (7th Cir. 1987); *In re Yagman, supra,* 796 F.2d at 1184. *See* Maute, *supra,* at 62.

The requirement that sanctions be limited to those necessary to redress the wrongful conduct is natural for those imposed under the "inherent powers" of the court because the "traditional equitable authority" of the federal court extends "no farther than required by the nature and extent" of the violation that prompts its exercise. *General Building Contractors Association, Inc. v. Pennsylvania,* 458 U.S. 375, 398, 102 S.Ct. 3141, 3154, 73 L.Ed.2d 835 (1982), *citing Milliken v. Bradley,* 433 U.S. 267, 97 S.Ct. 2749, 53 L.Ed.2d 745 (1977). It would also seem to be a natural corollary to the principle that, because "inherent powers" are "shielded from direct democratic controls, they must be exercised with restraint and discretion." *Roadway Express, Inc. v. Piper, supra,* 447 U.S. at 764, 100 S.Ct. at 2463, *citing Gompers v. Bucks Stove & Range Co.,* 221 U.S. 418, 450-451, 31 S.Ct. 492, 501-502, 55 L.Ed. 797 (1911). *See also* 6 Moore, Taggart, and Wicker, *Moore's Federal Practice* §54.78 [3] 54-508 (2d ed. 1988), noting that courts possess the "inherent power" to award attorney's fees "made necessary by the unjustified conduct."

Three policies are fostered by requiring that sanc-



tions be tailored to the wrong: (1) the educational purpose of the sanction is enhanced by letting judges pinpoint the abusive acts; (2) the deterrent effect is increased by making the imposition of the penalty for each infraction more certain; and (3) the possibility of abuse is reduced by eliminating the likelihood that a party will run up unreasonable costs and then petition for their reimbursement at the conclusion of the litigation. *St. Amant v. Bernard,* 859 F.2d 379, 382 n.12 (5th Cir. 1988).[13]

There is an additional reason why sanctions should be carefully tailored to the offense. While this Court has held that punitive damage awards are not subject to the Eighth Amendment's prohibition against "excessive fines," in so doing it noted that the Excessive Fines Clause does prohibit the imposition of "excessive monetary sanctions." *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.,* __U.S.__, 109 S.Ct. 2909, 2920, 106 L.Ed.2d 219 (1989). In addition, this Court expressly left open the possibility that the Due Process Clause of the Fourteenth Amendment may place an outer limit on the size of a punitive damage award. *Id.* at 2921, *citing Bankers Life and Casualty Company v. Crenshaw,* 486 U.S. 71, 86, 108 S.Ct. 1645, 1654, 100 L.Ed.2d 62 (1988) (O'Connor, J., concurring). In the context of sanctions, it has been noted that, to avoid the possibility that the sanction will in effect constitute a criminal fine, requiring extensive due process safeguards, the sanction should be limited to "consequential expenses and attorney's fees., i.e., those incur-

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13. Several courts have held that even under the "bad faith" exception, which is a fee shifting rule, fees that have no relation to the complained of conduct should be excluded from the award. *Marshall v. Perez Arzuaga,* 828 F.2d 845, 852-53 (1st Cir. 1987), *cert denied,* 484 U.S. 1065, 108 S.Ct. 1027, 98 L.Ed.2d 991 (1987); *Sierra Club v. U.S. Army Corps of Engineers,* 776 F.2d 383 (2d Cir. 1985), *cert. denied,* 475 U.S. 1084, 106 S.Ct. 1464 (1986); *Lipsig v. National Student Marketing Corporation,* 663 F.2d 178, 181 n.21 (D.C. Cir. 1980); *Richardson v. Commercial Workers of America,* 530 F.2d 126, 133 (8th Cir. 1976), *cert. denied,* 429 U.S. 824, 97 S.Ct. 77 (1976); *Grunin v. International House of Pancakes,* 513 F.2d 114, 127-29 (8th Cir. 1975), *cert. denied,* 423 U.S. 864, 96 S. Ct. 124 (1975).

red 'because' of the paper filed in violation." Schwarzer, *supra*, 104 F.R.D. at 2-2-203. *See also Donaldson v. Clark, supra*, 819 F.2d at 1559 n.10, 1561 ("It may be that the monetary sanction being considered in a specific case is so severe in amount or so arguably unrelated to the misconduct that due process will require extensive due process safegards as prerequisites to its imposition. . . . The more serious the possible sanction both in absolute size and in relation to actual expenditures, the more process that will be due."); *In re Yagman, supra*, 796 F.2d at 1880 ("If the amount of the sanction imposed is grossly disproportionate to the attorney's misconduct, or otherwise falls outside the bounds of the authority for the sanction, then the court should be cognizant of the possibility of a latent fine."). *See also Ray A. Scharer and Company, Inc., v. Plabell Rubber Products, Inc.*, 858 F.2d 317, 321 (6th Cir. 1988).

The third precept of sanctions is the "mitigation principle," limiting recovery to "those expenses and fees that were reasonably necessary to resist the offending paper." Schwarzer, *supra*, 104 F.R.D. at 198. *See also Napier v. Thirty or More Unidentified Federal Agents*, 855 F.2d 1080, 1092 (3rd Cir. 1988); *Dubisky v. Owens*, 849 F.2d 1034, 1037 (7th Cir. 1988); *Thomas v. Capital Security Services, Inc. supra*, 836 F.2d at 880; *Brown v. Federation of State Medical Boards, supra*, 830 F.2d at 1439; *In re Yagman, supra*, 796 F.2d at 1184. Mitigation is required to further the deterrent effect of the sanction. The sanction's purpose "would be frustrated if it encouraged the offended party to play the very game at which it is aimed." Schwarzer, *supra*, 104 F.R.D. at 201.

Fourth, a true sanction should not be imposed by a court for conduct that does not occur before that court. For example, a trial court should not impose sanctions for a frivolous appeal or writs. *Sierra Club v. U.S. Army Corps of Engineers, supra*, 776 F.2d at 392; *Roth v. Pritikin*, 787 F.2d 54, 58-59 (2d Cir. 1986). "A rule permitting a district court to sanction an attorney for appealing an adverse ruling might deter even a courageous lawyer from seeking the



reversal of a district court decision." *Emergency Beacon Corporation v. Montmartco, Inc.*, 790 F.2d 285 (2d Cir. 1986). This Court has recently recognized that, at least as far as sanctions are concerned, Federal Rule of Appellate Procedure 38 places "a natural limit on Rule 11's scope" because "the knowledge that, after an unsuccessful appeal of a Rule 11 sanction, the district court that originally imposed the sanction would also decide whether the appellant should pay his opponent's attorney's fee would be likely to chill all but the bravest litigants from taking an appeal." *Cooter & Gell v. Hartmarx Corporation, supra*, 110 S.Ct. at 2462. At least one court has applied the same principle to attorney's fees awards made under the "bad faith" exception. *See Morris by Rector v. Peterson*, 871 F.2d 948 (10th Cir. 1989).

Finally, sanctions are personal. *Hall v. Cole, supra*, 412 U.S. at 5, 93 S.Ct. at 1946; *Robinson v. Ritchie*, 646 F.2d 147, 148 n. 3 (4th Cir. 1981); *Browning Debenture Holders Committee v. DASA Corporation*, 520 F.2d 1080, 1089 (2d Cir. 1977). Obviously, sanctions should only be imposed on those persons or entities guilty of wrongdoing, or the deterrence value will be lost entirely and the sanction will constitute nothing but an unjust punishment that will chill innocent activity. *C.f. Pavelic & Le Flore v. Marvel Entertainment Group, supra*, 110 S.Ct. at 460.In most cases, the lawyer will be the correct party to respond. "Since attorney's are more knowledgeable about the law and in control of most of the procedural steps taken," the current trend is to "impose penalties only upon the offending lawyer.' Mallor, *Punitive Attorneys' Fees for Abuses of the Judicial System*, 61 N.C.L.R. 613, 649 (1983); *Eash v. Riggins Trucking Co.,Inc. supra*, 757 F.2d at 564 n. 10. *See also* American Judicature Society, *Rule 11 in Transition, The Report of the Third Circuit Task Force on Federal Rule of Civil Procedure 11* 30-31 (Burbank, Reporter 1989) (assuming that "if sanctions are imposed, they will be imposed on the lawyer.... Clients who are not lawyers are not bound by the rules of professional ethics."); *Slane v. Rio Grande Water Conservation Dist.*, 115 F.R.D. 61, 63 (D.

Colo. 1987)(refusing to "hold laymen responsibile for fees, when it is apparent that competent counsel would have advised them that their claims are without merit."). In fact, it has been held that a lesser standard of behavior is expected of clients than of their attorneys for the purpose of Rule 11. *Calloway v. Marvel Entertainment Group*, 854 F.2d 1452, 1474 (2d Cir. 1988), *rev'd in part on other grounds, sub nom. Pavelic & LeFlore v. Marvel Entertainment Group, supra*, 110 St. Ct. 456.[14]

The attorney's fees award approved by the Court of Appeals cannot by any stretch be viewed as an exercise of the court's "inherent power" to sanction litigants who abuse its processes because the award does not possess any of the characteristics of a sanction. To begin with, the award was made over sixteen months following the final determination of the merits of the litigation. No "sanctions" of attorney's fees were imposed during the entire six year course of the case, while all of the perceived wrongs of discovery abuses, frivolous pleadings, unjustified requests for delay, etc. were occurring. Instead of exercising the powers that could hold this conduct in check, the trial court merely gave warnings that sanctions were available. But, a distinction is to be drawn between "the general notice about sanctions and notice that santions are being considered." *Tom Growney Equipment, Inc. v. Shelly Irrigation Development, Inc.*, 834 F.2d 833, 836 n.5 (9th Cir. 1987). The continued issuance of "warnings" without the actual imposition of sanctions could only have a salutary effect, leading the parties to believe that their conduct had not transgressed the permissible bounds. "Misconduct, once tolerated, will breed more misconduct." Schwarzer, *supra*, 104 F.R.D. at 205. Accordingly, the timing of the attorney's fee award prevented it from having any deterrent effect in this case. The sanctions award which was not requested or granted until long after the conclusion of this

[14]. At present, this issue is pending before this Court in *Business Guides, Inc. v. Chromatic Communications Enterprises, Inc.*, Docket No. 89-1500, and is scheduled for oral argument on November 26, 1990.



litigation, is far "more retaliatory than substantive in nature." *Stevens v. Lawyers Mutual Liberty Insurance Company*, 789 F.2d 1056, 1061 (4th Cir. 1986).

Nor is the attorney's fee award closely tailored to the perceived wrong. The "sanction" levied in this case contemplates reimbursement of every penny of fees incurred by NASCO from the drafting of the complaint forward, including, incredibly, the closing costs incurred by NASCO — costs that the Purchase Agreement explicitly allocated to NASCO — and the costs incurred by NASCO in prosecuting its claim for delay damages, which it eventually settled! These two activities alone amounted to $185,966.39 of NASCO's total attorney's fees (R.2885), and cannot by any conceivable notion be considered a result of Chamber's bad faith *litigation* conduct. Moreover, the award includes every penny expended by NASCO answering every pleading filed by CTR, even though the trial court explicitly found that "there was some legal basis for some of the defenses" asserted. (Pet. App., 33a) Such "round figuring" upon a mere finding that substantially all of NASCO's fees were attributable to CTR's wrongful conduct is "unsound" as a sanction because it does not allow for a comparison of the sanctions imposed and the perceived wrongful conduct. *In re Yagman, supra*, 796 F.2d at 1165.

The attorney's fees could not have been tailored in this case. The proof of attorney's fees consisted of nothing more than invoices that reflected a whole month's worth of work at one time, with a single narrative describing the entire office effort. No breakdown was made of the time expended on any particular task, the cost or fee associated with that task, or even the person performing that task.[15] There was simply no way for the trial court to determine whether the fees incurred by NASCO were "reasonable," and has been required by the landmark case of *Johnson v.*

[15] Samples of these invoices are included in the Joint Appendix at 133-39.

Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), expressly adopted by this court in *Hensley v. Exkerhart,* 461 U.S. 424, 429, 103 S.Ct. 1933, 1937, 76 L.Ed.2d 40 (1983), or whether they were attributable to any wrongdoing. *See also Coleman-Worthington Productions v. Schuller,* 914 F.2d 1496 (9th Cir. 1990), and *Sidag Aktiengesellschaft v. Smoked Foods Products Company, Inc.,* 854 F.2d 799, 801 (5th Cir. 1988), both holding that attorney's fees award under the "inherent power" of the court are not immune from the general guidelines that apply to any award of attorney's fees.

No deduction was made in the attorney's fee award for NASCO's failure to mitigate its expenses. NASCO litigated for six years and did absolutely nothing to obtain a summary disposition of this case in the face of a single defense that the Court of Appeals found so frivolous as to merit a *per curiam* affirmance issued from the bench at oral argument and the immediate imposition of sanctions. Instead of hurrying this case along, NASCO filed endless motions and memoranda. "Clearly frivolous litigation may be rebutted quite simply without a flurry of documents." *Brown v. Federation of State Medical Boards, supra,* 830 F.2d at 1439. "If a baseless claim could have been readily disposed of by summary procedures, there is little justification for a claim for attorney's fees and expenses engendered in lengthy and elaborate proceedings in opposition." Schwarzer, *supra,* 104 F.R.D. at 201.

The sheer size of the award made in this case, coupled with its failure to bear any relation to the amount of attorney's fees incurred by NASCO attributable to the wrongful conduct, raises Eighth and Fourteenth Amendment concerns. "The extraordinarily large assessment of expenses in this case appears to be unreasonable on its face." *Batson v. Neal Spelce Associates, Inc.,* 765 F.2d 511, 516 (5th Cir. 1985). *See also In Re: Yagman, supra* ("$250,000 is a remarkably large monetary sanction—large enough to raise immediate suspicion.")



Nor does the sanction imposed by the trial court confine itself to conduct occurring before the trial court. The fine includes amounts incurred by NASCO before the Court of Appeals on writs and in prior appeals, before this Court on a request for stay, and before the Federal Communications Commission during administrative proceedings involving transfer of KPLC's license, which were never condemned by these tribunas, but all of which the trial court deemed to be frivolous and subject to sanction months and years later.

Finally, the sanction is not "personalized." Chambers is exclusively assessed for the entire $1,000,000, even though it is inconceivable that he personally was responsible for NASCO's expenditure of that sum (unless of course the sanction is viewed as punishment for his breach of contract). As explained above, he did not make any of the decisions regarding the method by which his defense would be conducted. The district court found that Gray and McCabe were at least equally as culpable. Its disbarrment of Gray and five year suspension of McCabe instead of calling upon them to share the monetary burden is not equitable apportionment—it is overkill of the rankest kind. Perhaps it found it difficult to apportion the monetary burden, given that it was making a single post-trial massive award instead of sanctioning a specific piece of conduct. But, that fact only further counsels against the use of a post-trial fee shift under the court's "inherent power" as a device to sanction precedural abuses. *See* Mallor, *Punitive Attorney's Fees for Abuses of the Judicial System,* 61 N.C.L.R. 613, 649 (1983)("A more difficult issue facing the courts after *Roadway* is how the sanction of attorneys' fees awarded to an opponent should be allocated between the offending attorney and client.").

There is a fine line that must be carefully tread when sanctions are imposed:

> If sanctions have the capacity to modify conduct in a way that improves the litigation process,

> they could also have the capacity to modify conduct in other ways as well; they might deter conduct that we do not want deterred because it is considered socially desirable. Specifically, there is at least the risk that the threat of sanctions might deter a zealous advocate from litigation designed to attack or dilute a precedent that he or she believes should be overruled. Classic examples of such precedents abound and chilling the zeal of those who would achieve change through litigation would be counterproductive. Moreover, the more severe the sanction imposed, the greater the risk of a chilling effect. Simply put, there is a possibility, if not a probability, that misapplied sanctions would have undesirable side effects.

Levin & Sobel, *Achieving Balance in the Developing Law of Sanctions,* 36 Cath. U.L.R. 587, 593 (1987).

All told, the lower courts have more than crossed the line. The fee shift awarded in this case is the antithesis of a proper exercise of the court's power to prevent abuse of its process. Yet, the Court of Appeals has found a reservoir of "inherent power" to impose the award, even though it is contrary to the substantive law that controls this case and serves no valid procedural purpose. This sets a dangerous precedent.

> Fairnness to litigants who suffer from abuse, and others in the case load queue, depends in large part upon reducing the reluctance of lawyers to seek and judges to impose sanctions in proper circumstances. At the same time, we embrace the fact that zealous advocacy is the attorney's ideal. Hard-fought, energetic and honest representation is at the bedrock of our judicial process. None of the various rules and statutes that authorize sanctions are intended, nor should they be implemented, "to chill an attorney's enthusiasm or creativity in pursuing factual or legal theories."
>
> The line between these equally important concerns is necessarily vague. Each case must be taken individually and evaluated in light of its own peculiar circumstances. If sanctions are warranted by those circumstances, the court must be meticulously aware that this precarious balance can only be maintained if the sanctions are justly imposed. This means foremost that the conduct in question must in fact be sanctionable under the authority relied upon. It also means that the amount of the sanctions and the manner in which they are imposed cannot be inconsistent with the purpose and directive of the authority on which the sanctions are based. [Sanctions] that do not fall within these guidelines . . . pose a direct threat to the balance between sanctioning improper behavior and chilling vigorous advocacy.



*In re Yagman, supra,* 796 F.2d at 1182-83.

There is no "inherent power" to shift the burden of attorney's fees, and to do away with the general American Rule, on "procedural grounds." Such a power is not "necessary for the exercise of all other powers." *Roadway Express, Inc. v. Piper, supra,* 447 U.S. at 764, 100 S.Ct. at 2463. An attorney's fee award that does not reflect the careful tailoring that marks a "sanction" is, by its nature, an award of damages, implicating substantive law. It has no value as a sanction. As a device to "vindicate judicial authority," it is purely retributive. And,

> to allow punishment to take the form of such a generic, all-encompassing, massive, post-trial retribution, with no indication whatsoever of its reasonableness, would send shivers through the bar.

*In re Yagman, supra,* 796 F.2d at 1185.

## CONCLUSION

The award of attorneys' fees made in this case should be reversed. It is not authorized by statute. Nor is it authorized by the "bad faith exception" to the general American Rule against fee shifting, which is not available in this diversity case. There is no other "inherent power" which allows the award. Those responsible for any procedural abuses in this case have already been punished by sanctions far more stinging than mere money. As to Chambers, he cannot be sanctioned for his "bad faith" breach of contract without violating the strictures of *Erie* and its progeny. Any attempt to sanction him at this late date (on remand for example) for procedural abuses would be completely contrary to the safeguards that prevent sanctions from becoming nothing more than instruments of retribution with a severe chilling effect. Moreover, the record in this case will simply not allow the kind of careful tailoring that any attempt to levy true sanctions would require. The proof submitted by NASCO of its attorneys' fees does not contain any of the detail that would be an absolute essential for such a task on that the law requires for awards of attorneys' fees. This is not by accident. Prior to the sanctions hearing, counsel for Chambers wrote to NASCO and expressly asked for such detail so that a determination of "reasonableness" could be made. (J.A. 130) NASCO not only refused to supply that information, but offered as its justification the fact that, "[b]ecause of the record retention policies of the various firms, such information is not readily available, and would be exceedingly burdensome, if not flatly impossible, to reconstruct." (J.A. 132) There is no justification for allowing NASCO to have a second opportunity to make its case for sanctions by introducing the evidence that it flatly refused to offer before on the ground of impossiblility. Accordingly, this case should not be remanded. The decision below assessing



NASCO's attorneys' fees against Chambers should be reversed and rendered.

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November 15, 1990

## QUESTIONS PRESENTED

1. Whether the well-established inherent power of a federal court to award attorneys' fees against a party who abuses the court's processes has been eliminated by the 1980 amendment to 28 U.S.C. § 1927 or the 1983 amendment to Rule 11 of the Federal Rules of Civil Procedure.

2. Whether an inherent power affecting the ability of federal courts to protect their own operations and integrity applies in diversity cases when the relevant state courts do not possess the same power.

3. Whether the district court abused its discretion in awarding respondent full attorneys' fees in this case.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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No. 90-256

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G. RUSSELL CHAMBERS,
*Petitioner,*

v.

NASCO, INC.,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

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**BRIEF FOR RESPONDENT**

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**STATEMENT**

This case grew out of a simple contract pursuant to which petitioner G. Russell Chambers and his company, Calcasieu Television and Radio, Inc. (CTR), agreed to sell a television station to respondent NASCO, Inc. When the sellers breached the contract, NASCO sued for specific performance. Although there was no colorable ground for resisting NASCO's claim, Chambers nevertheless pursued a vigorous campaign of fraudulent, dilatory, and abusive conduct designed to deprive NASCO of the effective relief to which it was indisputably en-

titled. The campaign began the day Chambers received notice of the lawsuit and continued for almost three years until NASCO finally obtained relief. The district court awarded attorneys' fees of $996,644.65 against Chambers, and the court of appeals affirmed the award.[1]

1. *The Merits of the Contract Lawsuit.* On August 9, 1983, NASCO entered into a contract to purchase from CTR and its sole shareholder and director, Chambers, a television station, KPLC-TV, and all of the assets used in its operation. Pet. App. A4. The "Purchase Agreement" required NASCO and CTR to use their best efforts to obtain the requisite permission from the Federal Communications Commission (FCC) for the transfer of KPLC-TV's broadcasting license. *Id.* at A5. To this end, the Agreement provided that NASCO and CTR would file a joint application with the FCC by September 23, 1983. *Ibid.* Sometime after August 22, 1983, however, Chambers decided not to go forward with the deal and asked NASCO to abandon the sale. *Id.* at A5-A6. NASCO refused. *Id.* at A6. On September 23, CTR breached the contract by failing to file its portion of the FCC application.

On October 17, 1983, NASCO filed suit for specific performance in the Western District of Louisiana, invoking the federal court's diversity jurisdiction. After lengthy pre-trial proceedings—described more fully below—a bench trial was held on April 17, 1985. I J.A. 7. As the district court later found, the defendants introduced not "one single item of evidence against the validity of the Purchase Agreement." Pet. App. A55. Indeed, on the eve of trial, Chambers and CTR stipulated that the Purchase Agreement was valid and enforceable, and that CTR had breached it. *Id.* at A16-A17. The defendants argued, instead, that the Agreement to sell the television station to NASCO should not be enforced. This

[1] The listing required by Rule 29.1 of this Court is set out in Respondent's Brief In Opposition at vi-vii.



position was based on the fact that the day before this case was filed—but *after* receiving mandatory notice of a motion for a temporary restraining order by NASCO—defendants had simulated a sale of certain key television properties to a related party (a newly created trust, with Chambers' sister, Mabel Baker, as trustee); that "sale," the defendants claimed, had priority under Louisiana law because it was recorded before the Purchase Agreement.

On November 8, 1985, the district court ruled in favor of NASCO. I J.A. 6. The court rejected the defense to the now-concededly valid Agreement, concluding that Chambers never had any intention of conveying ownership of the station properties to the new Trust and thus, under Louisiana law, the "sale" was a sham transaction and without legal effect. *Id.* at 31-34. The court thereupon ordered CTR and Chambers to perform the Purchase Agreement, finding such performance entirely practicable. *Id.* at 34-35.

On August 6, 1986, the United States Court of Appeals for the Fifth Circuit affirmed, ruling from the bench at the close of oral argument. I J.A. 46. The court of appeals rejected the arguments of Chambers and CTR, describing them as "disingenuous," and held that the appeal was "manipulative," "completely frivolous," and therefore deserving of sanctions under Federal Rule of Appellate Procedure 38. *Ibid.* The court remanded the case to the district judge for a determination of the costs and attorneys' fees incurred by NASCO in the appeal. *Ibid.* The court of appeals also instructed the district court to determine whether sanctions under Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927 should be imposed against CTR, Chambers, and/or their lawyers for the conduct described below. *Id.* at 46-47.

The sale of the television station was closed on August 27, 1986, after almost three years of litigation.

2. *Petitioner's Abuse of the Court's Processes.* Petitioner's abuse of the judicial process—which the district

court said was "as classic an example of vicious, deliberate, deceitful, fraudulent and sanctionable conduct as the Courts can produce," the "modern counterpart" of "trial by ordeal" (Pet. App. A50)—began the moment he learned that NASCO's lawsuit was about to be filed. On Friday, October 14, 1983, NASCO notified Jonathan Golden, an officer of CTR and an attorney for CTR and Chambers, that on the following Monday it would file suit for specific performance and seek a temporary restraining order (TRO) prohibiting the transfer or encumbrance of any of the properties subject to the Agreement. *Id.* at A2, A9. This notice, the purpose of which was to enable CTR and Chambers to be present and defend their interests at the hearing, was required under Federal Rule of Civil Procedure 65(b) and Rule 11 of the local rules of the district court. *Id.* at A9.

With knowledge of NASCO's impending suit, Chambers and A.J. Gray, an attorney for CTR and Chambers, on Sunday, October 16, embarked on "a fraudulent scheme . . . designed to place the operating properties of CTR beyond the reach and jurisdiction of th[e] Court." *Ibid.* The scheme was to create a new entity subject to Chambers' control, the Facility Trust, and "sell" the television station's real properties to the Trust. The Trust would then lease the assets back to CTR so that Chambers could continue operating the station. *Id.* at A2, A10. Because the Purchase Agreement with NASCO had not been recorded, Chambers and his lawyer Gray planned to argue that the subsequent "sale" to the Trust would have priority, under Louisiana's Public Records Doctrine, because it would be recorded first. *Id.* at A8-A9; I J.A. 33-34.

Chambers and Gray created the Trust on October 16, supposedly with a corpus of $1,000. They appointed as trustee Chambers' sister, Mabel Baker, and named Chambers' three adult children as beneficiaries. Pet. App. A9-A10. The same day, CTR's president (Chambers' future wife), at Chambers' direction, executed



duplicate warranty deeds purporting to convey CTR's two tracts of land to Baker, as trustee, for a recited consideration of $1.4 million. *Id.* at A10. Once these steps had been taken, Chambers called Baker in Birmingham, Alabama, obtained her oral consent to name her as trustee, and informed her that he would fly to Birmingham the next day to have her sign some documents. *Ibid.* Chambers did not tell Baker about the sale at that time. *Ibid.* At 8:30 a.m. on Monday, October 17, the deeds, lacking the signature of the purported purchaser, were recorded at the direction of Chambers and Gray. *Id.* at A10-A11.

Later that morning, NASCO filed its complaint, and a hearing was held on its application for a TRO. *Id.* at A11. Gray participated fully in the TRO conference by telephone, but failed to say anything about his and Chambers' efforts to transfer CTR's property to the Trust. *Ibid.* The TRO issued at 1:34 p.m. *Ibid.* Several hours later, Chambers flew to Birmingham, met Baker at the airport, and obtained her signature on a $1.4 million note to CTR and her acceptance of the office of trustee. *Id.* at A12. Baker signed the documents without explanation from Chambers and without an understanding of their contents or the sale they purported to effect. *Ibid.* These actions by Chambers, occurring after the TRO issued and notice was given to Chambers' lawyer, were "an absolute violation of" the TRO. I J.A. 29-30.

In the days following entry of the TRO, Chambers' attorneys prepared and sent to Baker an agreement under which the Trust leased back to CTR the properties allegedly conveyed to the Trust in the warranty deeds. Pet. App. A13. On October 24, 1983, the district court held a hearing and granted a preliminary injunction that, among other things, ordered CTR and Chambers, as well as their "agents, employees, servants, attorneys, and all persons in active concert and participation with them," to refrain "from selling, transferring, conveying,

assigning or in any way encumbering any of the assets being purchased by plaintiff NASCO, Inc., pursuant to the terms of the Purchase Agreement dated August 9, 1983." Preliminary Injunction at 1-2 (Oct. 24, 1983). Also at the October 24 hearing, the court issued the first of many warnings to defendants, admonishing Gray that "the acts of Chambers and himself on October 16 and 17 . . . were reprehensible and unethical and that no acts of that nature should be repeated in the future." Pet. App. A13. The next day, October 25, Baker signed and returned the leaseback agreement. *Ibid.* The district court found that the execution of the leaseback agreement was "in absolute contempt of the TRO and the injunction." *Id.* at A24.

Chambers' abuses continued through every phase of the proceedings, during which the court repeatedly warned the defendants to cease their improper behavior. In November 1983, Chambers refused to allow NASCO to inspect certain corporate records, "in direct defiance of the standing preliminary injunction." *Id.* at A14. Chambers was held in contempt and fined $25,000 as a result. *See NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 583 F. Supp. 115, 121-22 (W.D. La. 1984). The contempt hearing conducted by the district court was, "by its inherent nature, a warning against any similar conduct in the future." Pet. App. A21; *see also* 583 F. Supp. at 122 ("Mr. Chambers has conducted himself in a sly and surreptitious manner on one prior occasion. . . . Thus, the fine must be sufficient to cleanse Mr. Chambers of his condescending attitude to ensure future cooperation in the *judicial* resolution of this matter.") (emphasis in original).

Chambers, CTR, and Baker next filed a series of "meritless motions and pleadings and delaying actions," including two motions for summary judgment on behalf of Chambers. *See* Pet. App. A14. The district court found that these and other filings were submitted "in absolute bad faith." *Id.* at A15. Chambers also filed various "charges and counterclaims" against NASCO. The district court found that these charges were "deliberate untruths and fabrications by Chambers" and that Chambers' attorneys "knew, at the time that they were filed, that they were false." *Id.* at A16; *see also id.* at A40-A41, A51-A52.



Chambers also repeatedly interjected irrelevant issues into the pretrial proceedings and used the discovery process to explore them. CTR and Chambers took "absolutely needless" depositions of bank officials and NASCO board-members on such issues. *Id.* at A15. The district court ordered several uncompleted depositions cancelled on the ground of irrelevance. "This was," the district court noted, "another warning." *Id.* at A22. Chambers likewise sought frequent "continuances of trial dates, extensions of deadlines and deferments of scheduled discovery." *Id.* at A15. The district court found that these actions were a "deliberate misuse of the judicial process" aimed at "defeat[ing] NASCO's claim by harassment, repeated and endless delay, mountainous expense and waste of financial resources." *Id.* at A16. The same aim was reflected in Chambers' designation of 100 witnesses before trial, even though he eventually called only two of them to testify. *Id.* at A17. Similarly, one month before the scheduled trial date of February 27, 1985, Chambers and CTR filed a motion to recuse the judge. *Id.* at A16. The district court denied the motion, which "was frivolous and had been filed for tactical purposes." *Id.* at A22. Defendants then unsuccessfully filed a petition for a writ of mandamus with the Fifth Circuit, thereby delaying the start of trial. *Id.* at A16.

Even after Chambers and CTR had lost decisively at trial, Chambers and his attorneys "continued to use every means, every subterfuge, every ruse possible to avoid performance of the Purchase Agreement." *Id.* at A17. Thus, before judgment had even been entered, Chambers

filed a petition with the FCC, without giving notice to NASCO, asking for permission to construct a new transmission tower and to move the station's transmission facilities to that site. *Ibid.* This attempt to alter the *status quo* directly violated the court's preliminary injunction. *Ibid.* Only informal intervention by the court and the threat of an additional sanction for contempt prompted Chambers to withdraw this petition. *Ibid.*

Once judgment was entered, Chambers "renewed his efforts to circumvent the merits judgment by fomenting opposition to the pending application for FCC approval of the transfer of the station license." *Id.* at A18. Chambers accomplished this by having two CTR officers lodge and prosecute formal oppositions to the transfer application, which was then pending before the FCC. *Ibid.* The district court found that these actions were "[i]n absolute violation of the injunction and of our Judgment of November 27, 1985." *Id.* at A24.

Chambers also attempted to exclude from the sale certain new operating equipment that had been acquired during the litigation to replace and augment equipment listed on Exhibit B to the Purchase Agreement. *Id.* at A20. When NASCO moved the court for judicial assistance in response to Chambers' efforts, Chambers' lawyer filed various papers "raising a multitude of irrelevant arguments; a request for a trial by jury on the pending motions, and a motion *in limine* to exclude any evidence pertaining to station assets not listed in Exhibit B." *Id.* at A19. At a hearing on NASCO's motion held on July 16, 1986, the court at the outset again warned defendants, who now were represented by a new attorney, Edwin McCabe, against employing any further abusive tactics. *Id.* at A22. Yet the hearing itself was "a case study in deception." *Id.* at A20. In an attempt to show that it did not own the disputed assets, CTR had prepared seventeen fraudulent equipment leases and its employees gave perjured testimony. *Id.* at A20, A57. In



addition, during a three-day recess in the hearing, the defendants, without informing the court or NASCO's counsel, removed from service all of the equipment at issue at the hearing. *Id.* at A19, A56. The court found that this was an attempt by Chambers to achieve extrajudicially the "very issues then before the court." *Id.* at A19.

Finally, even as NASCO's motion for judicial assistance was under consideration by the court, Chambers attempted to force NASCO into violating the Agreement by unilaterally insisting on proceeding to a closing of the sale without resolution of the dispute over the equipment. This necessitated yet another motion by NASCO seeking an emergency ruling on the motion for judicial assistance. The court granted the motion on July 31, 1986, later explaining that Chambers' effort was "nothing more and nothing less than an attempt to maneuver NASCO into position for termination of the sale." *Id.* at A20.

3. *Sanctions in the District Court.* After the Fifth Circuit's decision affirming the trial court on the merits and ordering consideration of sanctions on remand, NASCO moved the district court to set the amount of appellate sanctions and to impose sanctions for Chambers' conduct throughout the trial court proceedings. Pet. App. A2. An evidentiary hearing was held on April 11, 1988. *Id.* at A4. The district court, in an opinion issued on January 23, 1989, imposed sanctions on Chambers and others.

After extensively reviewing the facts set forth above, the court ruled that Chambers "knowingly and deliberately took advantage of [the TRO] notice to form and set into motion an illegal and fraudulent scheme . . . designed to place the operating properties of CTR beyond the reach and jurisdiction of this Court . . . and to deprive NASCO of a judicial determination of its rights to specific performance." *Id.* at A9-A10; *see also id.* at A51-A52. The court further concluded that Chambers was personally

aware of and responsible for the acts of his attorneys and that Chambers had not been led astray by legal advice. *Id.* at A24-A25. Chambers was, in the court's view, "the principal conspirator, the driving force, and the only person whose interests were served by the conspiracy and the sanctionable acts alleged." *Id.* at A42.

Assessing the expenses incurred by NASCO as a result of Chambers' efforts to deprive it of a fair adjudication, the court charged Chambers with $66,286.65 in appellate sanctions and $996,644.65 in attorneys' fees and related expenses. Finding that both 28 U.S.C. § 1927 and Rule 11 would be inadequate to redress the full range of improper litigation behavior engaged in by Chambers, the court invoked its inherent authority as a basis for the award. *Id.* at A39-A47.[2]

4. *The Court of Appeals Decision.* The Fifth Circuit affirmed the fee award. Pet. App. A59. After reviewing the extensive course of conduct upon which the district court had based its sanctions (*id.* at A60-A66), the court addressed Chambers' arguments that a district court generally lacks the inherent authority to award attorneys' fees for bad faith litigation practices, and that it specifically lacks that authority in diversity cases when state law does not permit such an award. Beginning with the proposition that "federal courts enjoy a zone of implied power incident to their judicial duty" (*id.* at A68), the court concluded that the award in this case was well within that zone.

Turning first to the "horizontal" limits on the courts' inherent power, the court of appeals held that "the rules of civil procedure and § 1927 do not displace a district court's power to shift fees for bad faith, wanton and vexatious conduct in the prosecution of the case." *Id.* at

[2] The court also reprimanded Baker and prohibited the three lawyers—Gray, McCabe, and Curry (the lawyer for the Trustee Baker)—from practicing in the Western District of Louisiana for periods of three years, five years, and six months, respectively.



A72. The court explained that "this much is implicit in *Alyeska* [*Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975)]." *Ibid.* The court added that the issue of displacement, of course, turns on Congress's intent in enacting statutes and allowing rules to come into force. *Id.* at A70-A71. The court found no such intent to displace the inherent authority at issue here, noting that various other congressional purposes are served by the statutes or rules invoked by the defendants.[3]

The court of appeals next examined the "vertical" limits placed on the district court's inherent powers under the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). *Id.* at A72-A78. The court first declined to read a footnote in *Alyeska* as settling the issue of whether *Erie* required the application of state law in these circumstances. Instead, relying on the legal framework articulated in *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), and *Hanna v. Plumer*, 380 U.S. 460 (1965), the Fifth Circuit declared that, when "no federal rule controls and *Erie* analysis is therefore necessary, the outcome-determination test 'cannot be read without reference to the twin aims of the *Erie* rule—discouragement of forum shopping and avoidance of inequitable administration of the laws.'" Pet. App. A73 (quoting *Hanna*, 380 U.S. at 468). Those aims are not implicated, the court ruled, by a fee award, like the present one, that is based on "bad faith in the prosecution of a claim." *Id.* at A76. Unlike an award based on "bad faith in an underlying transaction," the award of fees incurred as a result of abuse

[3] Other possible goals cited by the court of appeals included: (1) to "alter[] the analysis of judicial reach in diversity cases" under the rule of *Hanna*, Pet. App. A70; (2) to further the "heuristic values of particularizing conduct that could without the rule be dealt with by a court's exercise of inherent power," *id.* at A71; and (3) to "sum experiences . . . despite the fact that singly the acts might not be so obstructive as to warrant ad hoc judicial responses," or conversely, to "reach for practices in their bud, before they come to flower." *Ibid.*

of the courts' processes "is not a matter of substantive remedy, but of vindicating judicial authority." *Id.* at A76-A77. The court concluded: "*Erie* does not compel a federal court to tolerate abuses in diversity cases that the court would not tolerate in other cases; nor does it limit the range of measures at the court's disposal to vindicate its authority." *Id.* at A77.

Having decided that the district court possessed the inherent authority to sanction Chambers, the Fifth Circuit next rejected Chambers' argument that there was insufficient evidence to support the district court's finding of bad faith. *Id.* at A78-A79. The court cited Chambers' central role in (1) "the creation of the trust, the sham transfer of the station's assets to it, and the almost immediate leaseback"; (2) the filing of the recusal motion; (3) the petitioning of the FCC for approval of construction of a new transmission tower, in violation of the district court's order; and (4) the presentation to the district court of false testimony and fraudulent equipment leases. *Ibid.* "Even making the dubious assumption that Chambers had nothing to do with other litigation tactics the attorneys undertook," the court reasoned, "this evidence sufficiently supports a finding of bad faith." *Ibid.* Lastly, the court held that the amount of the sanction imposed on Chambers was not an abuse of discretion since "NASCO's expenses throughout this litigation were without exception the product of Chambers' bad faith tactics." *Ibid.*[5]

[5] The Fifth Circuit upheld the district court's disbarment sanctions against the attorneys, except that it remanded for reconsideration of McCabe's disbarment in light of subsequent developments. Pet. App. A79-A83. On rehearing, the Fifth Circuit also remanded Curry's sanction for further consideration by the district court. *Id.* at A84-A85. None of the issues involving attorney sanctions are before this Court.



## SUMMARY OF ARGUMENT

The district court awarded respondent its full attorneys' fees, concluding that petitioner had engaged in a "sordid scheme of deliberate misuse of the judicial process[] to defeat NASCO's claim by harassment, repeated and endless delay, mountainous expense and waste of financial resources." Pet. App. A16. The court had the "inherent power" to make such an award and did not abuse its discretion in doing so here.

1. Federal courts possess the "unquestioned" inherent power to award attorneys' fees against parties who abuse their processes. *Hall v. Cole*, 412 U.S. 1, 5 (1973); *see Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980). Contrary to petitioner's submission, that power has not been eliminated by Congress or rendered obsolete through the 1980 amendment to 28 U.S.C. § 1927 or the 1983 amendment to Rule 11 of the Federal Rules of Civil Procedure. Neither provision evinces the slightest hint of an intent to dismantle this six-hundred-year-old core judicial power. Nor is either provision coextensive with the courts' inherent power: 28 U.S.C. § 1927 is expressly limited to certain actions by an "*attorney*" and thus does not reach traditionally sanctionable behavior by a *party*, such as perpetrating a fraud on the court or disobeying its orders; and Rule 11 likewise extends only to a particular set of activities relating to the "signing of pleadings, motions and other papers."

2. The federal courts' inherent power to impose fees applies in diversity as well as federal question cases. By its very nature, an inherent power cannot be a "rule of decision" under 28 U.S.C. § 1652. Its sole purpose is to protect the interests of a court *qua* court, thus implicating a "strong federal policy" concerning the "administ[ration] [of] justice to litigants who properly invoke [a federal court's] jurisdiction." *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 537-38 (1958). At the same time, the exercise of such power does not

impinge on the "twin aims of the *Erie* rule: discouragement of forum shopping and avoidance of the inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). On the contrary, a rule allowing fees for abuses of a court's processes is strictly neutral between litigants, favoring neither plaintiffs over defendants nor out-of-staters versus in-staters.

3. The district court's award of full attorneys' fees in this case must be affirmed because it does not rest "on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2461 (1990). As to the law, the court properly set the amount of the award in terms of its two goals—to protect the integrity of the judicial process and to make whole an innocent party. In particular, the court found that petitioner's entire defense was predicated on a fraud, and supported by tactics designed to delay and frustrate resolution of respondent's meritorious claim for specific performance. Those overarching findings, moreover, were amply supported by the record. Petitioner abused the judicial process from the moment he took advantage of the TRO notice required by Federal Rule 65(b) to manufacture a fraudulent defense, right through to his repeated post-judgment refusals to obey the court's orders.



## ARGUMENT

The questions presented by this case are whether the federal district court had the power to award attorneys' fees against a party who abused its processes and, if so, whether the court here acted within its discretion when it awarded respondent all of its fees. Both questions must be answered in the affirmative. The authority to award attorneys' fees against a party who abuses the judicial process is a well-established part of a federal court's inherent power, extending to diversity as well as federal question cases; and the exercise of that power was entirely proper in this case.

### I. FEDERAL COURTS POSSESS THE INHERENT POWER TO AWARD ATTORNEYS' FEES TO A PARTY WHOSE ADVERSARY HAS PURSUED OR CONDUCTED LITIGATION IN BAD FAITH.

Petitioner acknowledges, as he must, that the federal courts "possess the 'inherent power' to award attorneys' fees . . . upon a finding of bad faith, vexatious or oppressive conduct." Pet. Br. 10-11. This Court has described that power as "unquestioned," *Hall v. Cole*, 412 U.S. 1, 5 (1973); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 (1975), and has reaffirmed its existence on numerous occasions. *See, e.g., Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766 (1980).[5] The Court has also explained that such a fee award "vindicates judicial authority without resort to the more drastic

[5] *See also Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562 n.6 (1986); *Summit Valley Indus., Inc. v. Local 112, United Bhd. of Carpenters & Joiners*, 456 U.S. 717, 721 (1982); *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978); *In re Primus*, 436 U.S. 412, 431 n.23 (1978); *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. at 259-60; *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974); *Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 n.4 (1968); *Vaughan v. Atkinson*, 369 U.S. 527 (1962); *Rude v. Buchhalter*, 286 U.S. 451 (1932).

sanctions available for contempt of court and makes the prevailing party whole for expenses caused by his opponent's obstinacy." *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978).

The authority to award attorneys' fees for abuses of the judicial process is part of a larger array of inherent judicial powers that includes the power: to hold a party in contempt, *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204 (1821); to discipline attorneys, *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335, 354 (1897); *Roadway Express*, 447 U.S. at 766 & n.12; to conduct an independent investigation to determine whether a fraud has been perpetrated on the court, *Universal Oil Prods. Co. v. Root Ref. Co.*, 328 U.S. 575 (1946); to dismiss a case *sua sponte*, *Link v. Wabash R.R.*, 370 U.S. 626, 630 (1962); to remove disruptive litigants, *Illinois v. Allen*, 397 U.S. 337 (1970); and to enjoin the filing of repeated, frivolous *in forma pauperis* petitions, *In re McDonald*, 109 S. Ct. 993 (1989).

Collectively, these powers exist to protect a court "whose dignity has been offended and whose process has been obstructed." *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 428 (1923). They are, in short, judicial powers that "'are necessary to the exercise of all others,'" *Roadway Express*, 447 U.S. at 764 (quoting *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)), and therefore are "governed not by rule or statute but by the control *necessarily* vested in courts to manage their own affairs." *Link*, 370 U.S. at 630 (emphasis added). *See also Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. 787, 798 (1987) ("courts by their creation vested with power 'to impose silence, respect, and decorum in their presence, *and* submission to their lawful mandate'") (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) at 227).[6]

[6] Petitioner appears to argue that the vitality of any particular inherent power depends on whether it can satisfy a test of "strict functional 'necessity.'" Pet. Br. 18. If, by that, petitioner means to suggest that, without the power in question, the judicial process would grind to a halt, he simply misunderstands this Court's precedents. *See, e.g., Link*, 370 U.S. at 629-30 ("the power to [dismiss a case *sua sponte*] is *necessary* in order to prevent undue delays in the disposition of pending cases and to avoid congestion in the calendars of the District Courts") (emphasis added). Indeed, it is difficult to see how any individual inherent power could be considered truly indispensable to the courts' ability to operate.



These settled principles notwithstanding, petitioner argues that "courts do not need th[is] inherent [fee-shifting] power," Pet. Br. 22, and therefore it should now be eliminated despite its six-hundred-year pedigree.[7] He further argues that, even if the power may be exercised in federal question cases, it still may not be employed in diversity cases "unless [it] is recognized by the applicable state law." *Id.* at 12. Petitioner is wrong on both counts.[8]

[7] The power to award fees for abuses of the courts' processes traces back to at least 1394. *See* Goodhart, *Costs*, 38 Yale L.J. 849, 854 (1923). As petitioner himself recognizes, "[t]his power was thought to be 'so far inherent in the equity court as to be *inseparable* from the exercise of its judicial authority.'" Pet. Br. 19 (emphasis added; citation omitted). *See Ladd v. Wright*, 72 Eng. Rep. 800 (1601) (awarding fees "*pur le unjust vexacon*"); *Dungey v. Angove*, 30 Eng. Rep. 644, 648-49 (1794) (equity court awarded fees for vexatious litigation "to do that, which appertains to justice, and that, which appertains to example, and to vindicate the honor and justice of the court"); *Ex Parte Simpson*, 33 Eng. Rep. 834, 835 (1809) (awarding fees for filing "irrelevant" affidavit).

[8] Petitioner is also incorrect in asserting that, because the inherent power to impose fees for process abuses originated with the Chancellor, "[t]hat equitable power was not available in this diversity case." Pet. Br. 21. As an initial matter, that position is simply irrelevant in this case, which involves "a purely equitable claim for specific performance." 1 J.A. 7. In any event, this Court has affirmed the existence of this power in law, equity, and admiralty cases interchangeably, *see* n.5, *supra*, and petitioner does not, nor could he, offer the slightest possible justification for why it would be any less necessary or appropriate in non-equity cases (to the

### A. The Inherent Power To Impose Attorneys' Fees For Abuses Of A Court's Processes Has Not Been Taken Away By Congress Or Rendered Obsolete.

Recognizing that this Court expressly approved the federal courts' authority to impose fees for abuses of their processes as recently as 1980 in *Roadway Express*, petitioner argues that two subsequent events—the 1980 amendment to 28 U.S.C. § 1927 and the 1983 amendment to Rule 11 of the Federal Rules—now make it unnecessary for those courts to retain that power. Aside from the fact that the Court has reaffirmed the power since those enactments, *see* n.5, *supra*, petitioner's claim is senseless on its face: if these other provisions are co-extensive with the scope of the authority exercised in this case, it is difficult to see what petitioner is arguing about (since both grounds were raised below and the judgment could thus be affirmed on those bases). As the district court indicated, however, these recent enactments address a more limited set of judicial concerns. *See* Pet. App. A39-A46. Neither reflects any suggestion that Congress intended to displace the courts' traditional inherent power, and neither provides a sufficient justification for doing so.

To begin with, as this Court has previously explained, the federal courts' authority to award fees for abuses of their processes continues to exist unless and until it is "forbidden by Congress." *Alyeska*, 421 U.S. at 259. The Court has also emphasized that, when dealing with judicial powers of such long-standing duration, it will insist on a clear expression of congressional intent before eliminating them. *See, e.g., Link*, 370 U.S. at 631-32 ("[i]t would require a much clearer expression of purpose than Rule 41(b) provides for us to assume that it was intended to abrogate [the inherent judicial power to

extent that concept even has continuing relevance after the adoption of the Federal Rules of Civil Procedure).



dismiss a case with prejudice]"); *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982) (an inherent equitable power that originated before 1789—such as the one at issue here—continues to exist absent "a clear and valid legislative command") (citations omitted). Neither Rule 11 nor 28 U.S.C. § 1927 comes anywhere near to satisfying this demanding standard.

In the first place, neither provision, by language or history, provides the slightest hint that it was intended to eliminate the inherent power at issue here. On the contrary, the Advisory Committee's Note to the 1983 amendment to Rule 11 expressly states that it was intended to "*buil[d] upon and expan[d]* the equitable doctrine permitting the court to award . . . attorney's fees[] to a litigant whose opponent acts in bad faith in instituting or conducting litigation." 97 F.R.D. 198 (1983) (emphasis added) (citing *Roadway Express*).[9] Likewise, there is nothing about 28 U.S.C. § 1927—which applies only to an "attorney" who "multiplies the proceedings in any case unreasonably and vexatiously"—to suggest that Congress intended to displace the separate power to impose fees on a *party* who engages in abusive behavior. *See Roadway Express, supra* (upholding inherent power to award fees against an attorney even though power to award fees against a party already existed).[10]

[9] In particular, the amendment intended to authorize the imposition of fees in certain circumstances even if the conduct in question does not rise to the level of subjective bad faith—for example, when the investigation that underlies a pleading fails to comport with the standard of objective reasonableness. *See* Advisory Committee Notes, 97 F.R.D. at 198-99 ("The standard is more stringent than the original good-faith formula and thus it is expected that a greater range of circumstances will trigger its violation.").

[10] The legislative history of the 1980 amendment also confirms this view. The amendment was part of the Antitrust Procedural Improvements Act of 1980, Pub. L. No. 96-349, § 3, 1980 U.S. Code Cong. & Admin. News (94 Stat.) 1156, which addressed Congress's

It is equally clear that neither provision, nor both together, would provide an adequate substitute for the power at issue here. That power extends to the full range of litigation abuses, including perpetration of a fraud on the court, *Universal Oil Prods. Co. v. Root Ref. Co.*, 328 U.S. at 580; refusal to comply with a court's order, *Toledo Scale Co.*, 261 U.S. at 427-28; and, more generally, pursuit or defense of litigation "vexatiously" or for "oppressive reasons." *F.D. Rich Co. v. United States ex rel. Indus. Lumber Co.*, 417 U.S. 116, 129 (1974) (citation omitted). Rule 11, by contrast, is specifically limited to particular requirements that must be satisfied with respect to "pleadings, motions, and other papers." It thus affects a narrower set of judicial concerns and relates primarily to attorneys, not parties.[11] Similarly, 28 U.S.C. § 1927 does not apply by its terms to any abuses when committed by a party. Although a lawyer may properly be sanctioned for some of those abuses, there will surely be times when counsel either does not know about them or cannot control them. Moreover, it may be entirely appropriate to sanction a party regardless of whether his lawyer is also sanctioned.

The power to impose attorneys' fees on a party who abuses the court's processes thus remains an important inherent power. Nothing else, including the particular provisions pointed to by petitioner, covers the same landscape. Without that power, therefore, federal courts would be significantly hampered in their ability to protect themselves as well as innocent parties who have been forced to incur needless fees in seeking a fair adjudication because their opponents have misused the judicial process.

concerns with the increasing procedural cumbersomeness of antitrust litigation. Nothing in the legislative materials suggests that Congress was concerned about the scope of the courts' existing inherent powers, let alone that it intended to eliminate a significant dimension of them.

[11] Even if Rule 11's sweep is somewhat broader than its plain language would suggest, *see Business Guides, Inc. v. Chromatic Communications Enters., Inc.*, 892 F.2d 802 (9th Cir. 1989), *cert. granted*, 110 S. Ct. 3235 (1990), it still could not plausibly be stretched to cover the full range of litigation abuses encompassed by a court's inherent power.



**B. The Inherent Power To Award Attorneys' Fees For Abuses Of The Judicial Process Applies In Diversity Cases.**

The federal courts' power to award fees for abuses of their processes applies in diversity as well as in federal question cases. By its very nature, an inherent power that protects the integrity and operations of a court *qua* court cannot depend for its existence on the jurisdictional basis of a case. Nothing in the *Erie* doctrine requires a contrary result: a rule allowing federal courts to impose fee awards for process abuses raises none of the concerns underlying *Erie*; such a rule, therefore, is not a "rule of decision" within the meaning of 28 U.S.C. § 1652.[12]

To confirm this conclusion simply requires a straightforward application of settled principles under the *Erie* doctrine. Thus, in *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958), the Court held that a federal rule affecting the "essential characteristics" of the federal courts need not yield to a contrary state rule in diversity cases. *Id.* at 537. Such rules, the Court explained, nec-

[12] In an effort to manufacture an *Erie* claim here, petitioner incorrectly charges that the "real object of [the district court's] scorn was not abuse of the procedural process, but rather the pretrial conduct of Chambers in refusing to perform the Purchase Agreement and his role in the creation of the Public Records Doctrine defense." Pet. Br. 26 (footnote omitted). As both opinions below make crystally clear, however, "the [fee] award was based on Chambers's bad faith in the manner of conducting the litigation." Pet. App. A76. In particular, petitioner was sanctioned, first, for attempting to perpetrate a fraud on the court by making it appear as though "the operating properties of CTR [had been placed] beyond the reach and jurisdiction of this Court," Pet. App. A9; second, for filing groundless and dilatory claims and motions, and taking interminable discovery thereon; and third, for disobeying the district court's orders on several occasions.

essarily implicate a "strong federal policy," precisely because "[t]he federal system is an independent system for administering justice to litigants who properly invoke its jurisdiction." *Id.* at 537-38. As the Court in *Hanna v. Plumer*, 380 U.S. 460 (1965), likewise explained:

> [M]atters which relate to the administration of legal proceedings [involve] an area in which federal courts have traditionally exerted strong inherent power, completely aside from the powers Congress expressly conferred in the Rules. The purpose of the *Erie* doctrine, even as extended in *York* and *Ragan*, was never to bottle up federal courts with 'outcome-determinative' and 'integral-relations' stoppers—when there are 'affirmative countervailing [federal] considerations' . . . .

380 U.S. at 472-73 (quoting *Lumberman's Mutual Casualty Co. v. Wright*, 322 F.2d 759, 764 (5th Cir. 1963)). In accord with this view, the Court in *Link v. Wabash R.R.*, *supra*, upheld the federal courts' inherent power to dismiss a diversity case without even discussing state law.

Moreover, as the Court's general analysis in *Hanna* explains, the question whether a state rule is a "rule of decision," and thus binding under 28 U.S.C. § 1652, cannot be determined "without reference to the twin aims of the Erie rule: discouragement of forum shopping and avoidance of the inequitable administration of the laws." 380 U.S. at 468. Neither of these concerns is raised by a rule authorizing federal courts to award fees in response to abuses of its processes. It cannot seriously be argued that a difference between state and federal practice in this regard would encourage "forum shopping." *Ibid.* As with Rules 11 and 37, which also authorize the imposition of sanctions for certain kinds of misconduct, fee awards for abuse of the judicial process are party-neutral: plaintiffs and defendants are equally advantaged or disadvantaged by them. Nor is there anything "inequitable" about a rule that treats



citizens and non-citizens alike, has no effect on the outcome of the underlying litigation, and does not even come into play unless a party seriously abuses the judicial process.[13]

Petitioner's assertion that this straightforward conclusion is barred by a footnote in *Alyeska* is untenable. In that note, the Court remarked that "state law denying the right to attorney's fees or giving a right thereto, *which reflects a substantial policy of the state*, should be followed [in diversity cases]." 421 U.S. at 259 n.31 (emphasis added). That statement does not cover the present type of fee award. It applies, by its terms, only to those fee-shifting rules that embody a substantive state policy, such as a prevailing-party rule designed to encourage the bringing of certain kinds of litigation. (In fact, the *Alyeska* statement is followed by a citation to a single case, *Sioux County v. National Surety Co.*, 276 U.S. 238 (1928), which involved precisely that kind of fee award.) But no state policy is impinged upon by a federal court's power to award fees in order to police abuses of *its* processes (let alone a policy that somehow outweighs the competing federal court interests). Thus, as the Fifth Circuit explained, the *Alyeska* footnote is simply not directed to the present case.[14]

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[13] The availability of sanctions under the Federal Rules of Civil Procedure also strongly supports the conclusion that the inherent power at issue here is "procedural" for *Erie* purposes. Pursuant to the Rules Enabling Act, 28 U.S.C. § 2072, a rule of civil procedure that "abridge[s], enlarge[s] or modif[ies] any substantive right" is impermissible. Yet it has never been questioned that awarding fees for violations of Rule 11 or 37 contravenes that prohibition. There is no basis for taking a different approach to an inherent power that serves similar purposes. *See Answering Serv., Inc. v. Egan*, 728 F.2d 1500, 1506 (D.C. Cir. 1984) (Scalia, J., concurring) ("[O]ne surely should not lightly denominate substantive for *Erie* purposes a matter closely allied to, if not inextricable from, what is specifically treated in the Federal Rules.").

[14] The Fifth Circuit recognized that other Circuits have interpreted the *Alyeska* footnote to support a contrary view, but con-

In sum, a rule, like the one at issue here, that is "directed at conserving judicial resources and preventing use of the courts as instruments of harassment," is "classically 'procedural.'" *Answering Serv., Inc. v. Egan*, 728 F.2d at 1506 (Scalia, J., concurring). Such a rule is solely the "business of the forum court," *ibid.*, and thus not a "rule of decision" requiring the application of a contrary state rule under *Erie*.

## II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN AWARDING RESPONDENT FULL ATTORNEYS' FEES.

The fee award in this case was properly tailored to the purposes that it is legitimately designed to serve. First, the district court concluded that full attorneys' fees were warranted because of the frequency and severity of petitioner's abuses and the resulting need to ensure that such abuses are not repeated (by others as well as by petitioner). Second, the court determined that fairness to respondent also required the award, finding that each of petitioner's individual abuses was part of an overall "scheme of deliberate misuse of the judicial process[] to defeat NASCO's claim." Pet. App. A16. Peti-

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cluded that those decisions tended either to be reflexive in their application of *Alyeska* or to confuse "bad faith in the manner of conducting the litigation" with "bad faith in the commercial transaction giving rise to the suit." Pet. App. A76. This same confusion is also reflected in several of petitioner's citations (Pet. Br. 12-14). *See, e.g., Nepera Chemical, Inc. v. Sea-Land Serv.*, 794 F.2d 688, 696 (D.C. Cir. 1986) (addressing power to award fees incurred in prior litigation against third party as a result of defendant's tortious conduct). Moreover, other Circuits, without even mentioning *Alyeska*, have routinely upheld the inherent power to award attorneys' fees for bad faith litigation conduct in diversity cases. *See, e.g., Beaudry Motor Co. v. Abko Properties, Inc.*, 780 F.2d 751, 756 (9th Cir.), *cert. denied*, 479 U.S. 825 (1986). *See also Ray A. Scharer & Co. v. Plabell Rubber Prods., Inc.*, 858 F.2d 317 (6th Cir. 1988) (recognizing power in diversity case and remanding for further fact finding on question of bad faith).



tioner's various challenges to the size of the award are meritless.

### A. The Award Was Based On Proper Legal Standards and Factual Findings.

The standard for reviewing a fee award based on bad faith litigation conduct is whether the district court abused its discretion. *See, e.g., Hall v. Cole*, 412 U.S. at 14; *cf. Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447, 2461 (1990) ("appellate court should apply an abuse-of-discretion standard in reviewing all aspects of a district court's Rule 11 determination"). That standard is plainly a "deferential" one, requiring a reviewing court to determine only whether the "[district court] based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Cooter & Gell*, 110 S. Ct. at 2461. Neither occurred in this case.

With respect to the legal dimension of the inquiry, the controlling question is whether the size of the award is reasonably tailored to serve its legitimate purposes. *See, e.g., Hensley v. Eckerhart*, 461 U.S. 424 (1983); *Maher v. Gagne*, 448 U.S. 122 (1980). As noted at the outset, a fee award for conduct that abuses a court's processes serves two such purposes: it "vindicates judicial authority . . . and makes the prevailing party whole for expenses caused by his opponent's obstinacy." *Hutto v. Finney*, 437 U.S. at 689 n.14. The district court in this case recognized these governing principles and applied them correctly.

To begin with, the court explained that to vindicate judicial authority, a fee award "should be sufficiently severe to convince others that such tactics shall not be tolerated." Pet. App. A51. This concern prompted an award of full fees here because "[t]his case is as classic an example of vicious, deliberate, deceitful, fraudulent and sanctionable conduct as the Courts can produce." *Id.* at A50. Indeed, the district court expressly relied on

*Universal Oil Prods. Co. v. Root Ref. Co.*, 328 U.S. 575, 580 (1946), where this Court stated that "if the court finds after a proper hearing that fraud has been practiced upon it, or that the very temple of justice has been defiled, the *entire cost* of the proceedings could justly be assessed against the guilty parties. Such is precisely a situation where 'for dominating reasons of justice' a court may assess counsel fees as part of the taxable costs." *Id.* at A43 (emphasis added by district court; citation omitted). The nature and frequency of the abuses at issue here, which included, but were in no way limited to, a fraud on the court make the present award seem modest in comparison.[15]

The district court next held that the compensatory function of its inherent fee-shifting authority also called for a grant of full fees. Having already found that petitioner's efforts were part of an overall scheme to misuse the judicial process, the court went on to conclude that "NASCO [was] forced to spend approximately a million dollars in this Court alone to win a suit in which defendants did not introduce one item of evidence to dispute its right of specific performance." *Id.* at A49. The court also observed that the Fifth Circuit had agreed with its view that petitioner's defense on the merits had been "completely frivolous," stating that "[a]s judges, we cannot check our common sense in the robing room and allow disingenuous arguments to characterize as serious an appeal as manipulative as is this one before us." *Id.* at A33. In short, as the Fifth Circuit later explained, "NASCO's expenses throughout this litigation were without exception the product of Chambers' bad faith tactics." Pet. App. A79.

[15] In view of the egregiousness of petitioner's behavior, the court further considered (though it ultimately declined to award) "monetary sanctions to compensate the United States for waste of judicial resources caused by this suit." Pet. App. A52 n.12 (citing cases).



The findings of fact on which these legal conclusions rest are fully supported by the record, and certainly are not "clearly erroneous." Petitioner commenced his abuses the moment that the court's processes were invoked. When he received the notice required by Rule 65(b) for a TRO—which is designed to preserve the *status quo*—petitioner immediately went to work to perpetrate a fraud on the court by pretending to sell the assets at issue in the litigation. And his efforts continued unabated right up to the end of these proceedings, as he repeatedly disregarded the court's orders in an attempt to defeat the judgment for respondent. The record also fully supports the court's findings as to each of the individual abuses that made up this "sordid scheme"—from petitioner's initial fraud on the court, to his disobedience of the court's orders, to his relentless pursuit of frivolous legal and factual claims.[16]

**B. Petitioner's Challenges To The Award Are Meritless.**

Ignoring this Court's standards for reviewing the district court's decision, petitioner proposes instead that such fee awards be reviewed according to the following five criteria: (1) they must be awarded immediately after the abuse occurs; (2) they must be "properly tailored"; (3) the other party has a duty "to mitigate" the amount of fees he incurs; (4) the award cannot apply to "conduct that does not occur before the court; and (5) the sanction must be "personalized." Pet. Br. 30-36. All but the second of these criteria are either improper or irrelevant, however, and none provides any basis for changing the award in this case.[17]

[16] The evidence relating to all of these findings is set out in detail in the court's opinion and summarized at pp. 4-9, *supra*.

[17] Petitioner's constitutional musings regarding the Eighth and Fourteenth Amendments are similarly meritless. Petitioner received a full evidentiary hearing on the fee award. Due process requires no more. *See* Pet. App. A46-A47, and authorities cited therein. Since the award was properly tailored to serve its legitimate pur-

In the first place, there is nothing wrong with imposing a fee award at the close of the proceedings. Indeed, this Court has already made clear that it is entirely appropriate to sanction a party "even 'years after the entry of a judgment on the merits.'" *Cooter & Gell*, 110 S. Ct. at 2456 (citation omitted). The court should not reward a party who seeks delay, especially in a specific performance case, by interrupting the merits proceedings to conduct sanctions hearings. Moreover, awaiting the conclusion of the proceedings makes particular sense with respect to the kind of fee award at issue here, because at that time the trial court is best able to assess what portion of a party's fees was spent responding to legitimate litigation tactics and what portion was caused by having to respond to his opponent's abuses. In fact, the district court in this case did not even know the full magnitude of some of petitioner's abuses until his voluntary stipulation on the eve of trial, and other abuses did not occur until after judgment. *See* Pet. App. A17-A21, A34.[18]

Petitioner's proposed mitigation principle is likewise out of place here. It defies common sense to think that a party will needlessly run up legal fees in the hope that he will get them back later: at best he can break even. Moreover, the principle has no application in this case. Petitioner's sole complaint is that respondent did not seek summary judgment. But petitioner himself made summary judgment unavailable by falsely claiming that there

poses, moreover, it can hardly have been "grossly disproportionate," Pet. Br. 34, under the Eighth Amendment—which, in any event, does not apply here. *See Browning Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909 (1989).

[18] In any event, petitioner is in no position to assert that he was somehow prejudiced by having the imposition of fees await the close of proceedings; he received "[e]arly notice" of his abasive behavior from the district court, Pet. Br. 31 (citation omitted), and was actually held in contempt as a result of it during the preliminary phase of discovery, 583 F. Supp. 115.



were factual disputes about the validity of the Purchase Agreement and the *bona fides* of his simulated sale to the Trust. Petitioner is thus in no better position to complain of a failure to mitigate than is a child who kills his parents and pleads for mercy on the ground that he is an orphan.[19]

By the same token, petitioner's argument that a fee award can be based only on conduct occurring directly before the court has already been squarely rejected. As long as a party receives an appropriate hearing, which petitioner did, he may be sanctioned for out-of-court abuses of the court's processes, such as, for example, disobeying court orders or inappropriate conduct at depositions. *See, e.g., Young v. United States ex rel. Vuitton Et Fils S.A.*, 481 U.S. at 798-800; *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. at 426-28. Similarly, petitioner cannot overturn the award on the ground he was an unwitting victim of his lawyers' malfeasance. Given the nature of the abuses—such as concocting a plan to deceive the district court into believing that the subject matter of the lawsuit had been removed from the court's jurisdiction, violating court orders, and fabricating testimony and documents—and the fact that they continued even after petitioner changed counsel, the district court could hardly have found anything other than that petitioner was "the principal conspirator, the driving force" behind the whole abusive scheme. Pet. App. A42.

Petitioner's only correct standard, then, is that a fee award should be "properly tailored" to serve its legitimate purposes. Petitioner goes awry, however, in apply-

[19] Contrary to petitioner's suggestion, moreover, there is no requirement that counsel maintain detailed time records to support a fee award for process abuses. In contrast to a case where a party seeks statutorily authorized fees for prevailing on the merits, in the present circumstances neither the client nor his attorney can anticipate in advance that he will be involved in one of the rare cases that will justify fees.

ing that standard. In addition to the fact that he fails to show that any particular portion of the fee award was unconnected to his abuses,[20] petitioner never comes to grips with the fundamental character of his actions: as both courts below recognized, petitioner's abuses were so pervasive that it was proper, indeed necessary, to find that his entire course of conduct constituted a systematic use of the litigation process for "oppressive reasons." *F.D. Rich Co.*, 417 U.S. at 129; *see Roadway Express*, 447 U.S. at 766.[21] Simply put, petitioner's whole litigation effort rested on "a plan of obstruction, delay, harassment, and expense sufficient to reduce NASCO to a condition of exhausted compliance." Pet. App. A36. In these circumstances, there was no abuse of discretion in awarding fees to compensate NASCO for all of its litigation expenses.

In sum, the district court imposed attorneys' fees in the proper amount and on the proper person.[22]

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[20] Even viewing the award as if it were based on a series of isolated events, there would be no justification for petitioner's unsupported claim that approximately $186,000 of respondent's fees "cannot by any conceivable notion be considered part of Chambers' bad faith *litigation* conduct." Pet. Br. 37. The $106,000 of those fees relating to the "delay damages" phase of the litigation were appropriate, even though the amount of those damages was settled by the parties, because the delay itself resulted from petitioner's improper tactics which in turn forced respondent to litigate the issue needlessly. And the $80,000 in closing fees were also properly awarded since petitioner's misuse of the court's processes had placed a serious cloud on respondent's title, thereby multiplying the costs of a routine closing many times over. *See* Findings of Fact and Conclusions of Law Proposed by NASCO at 69-71.

[21] To support the opposite view, petitioner goes so far as to quote only the non-italicized part of the following sentence from the district court's opinion: "*Although* there was some legal basis for some of [petitioner's] defenses, *when we view them in context with the entire record, it is quite obvious that defendants' true purpose was delay, harassment and killing expense.*" Pet. App. A33 (emphasis supplied), quoted at Pet. Br. 37.

[22] If, contrary to our submission, the district court either lacked the inherent power to award fees or abused its discretion in doing so, the case should be remanded for further proceedings consistent with the Court's opinion. Petitioner's assertion that it would somehow be improper "to sanction him at this late date (on remand for example) for [his] procedural abuses," Pet. Br. 42, is nonsense.



## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,


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# NO. 90-256



In the
# Supreme Court of the United States

OCTOBER TERM, 1990

G. RUSSELL CHAMBERS
Petitioner,

v.

NASCO, INC.
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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## STATEMENT OF THE CASE

NASCO's concentration upon the underlying facts of this case (12 of 29 pages of brief) suggests that it is of the view that those facts are the measure of the district court's "inherent power." Chambers believes that this Court did not grant certiorari in this case because of a preoccupation with the facts. The facts of this case, no matter how "bad" they may have been painted, do not justify the district court's unprecedented invocation of its "inherent power" to shift the entire burden of attorneys' fees in direct contravention of the underlying and controlling state law. Nor does the long delayed, post-trial, retributive manner in which that power was wielded make this case a good candidate for charting such a new course.

Admittedly, some of the conduct that occurred in this case was flagrantly sanctionable. Counsel would be hard pressed to defend some of Chambers' lawyers' tactics and practices. For this, they have been severely punished. Imposing a $1,000,000 penalty upon Chambers for this conduct is not "necessary" for the functioning of the courts, the hallmark of any "inherent power." Such an award is only "necessary," or even useful, to the goal of compensating NASCO for Chambers' bad faith breach of contract, a goal which unquestionably belongs within the sphere of the substantive law, and which is anathema to the substantive law of Louisiana that controls in this case.

Despite Chambers' belief that the conduct that was the object of the sanction is not dispositive of the significant legal issues presented by this case, he would be remiss to himself, if no one else, to forego this opportunity, perhaps his last, to place upon the public record his true lack of complicity in the "abuses of process" that allegedly justify the $1,000,000 sanction levied against him. After learning of certain misrepresentations about its plans for the future of KPLC-TV made by NASCO in its ascertainment papers to the F.C.C., Chambers decided that he did not want to sell the station's assets to NASCO. He offered to pay damages instead of performing. His offer was

refused. Chambers then contacted his attorneys and asked them if they could excuse performance by payment of damages. His lawyers devised a plan which they assured him was legal and would eliminate his obligation to specifically perform the contract. It was the lawyers' conclusion that they could take advantage of NASCO's failure to record its purchase agreement with CTR by placing the station assets in the hands of a third person and spreading that transfer upon the public records. According to the lawyers, Chambers would then be relieved of any obligation to specifically perform the agreement under Louisiana's peculiar Public Records Doctrine, although he would remain liable for the damages that he was willing and had offered to pay. After Chambers' skepticism of the lawyers' plan was quelled by their reassurances that the plan was legal, he agreed to follow their advice. Accordingly, he executed the necessary documents to effect a transfer of the station assets, and travelled to Birmingham, Alabama, to secure the signature of his sister Mabel Baker, the prospective third party purchaser/trustee designated and approved by his attorneys, on an instrument to effect the trust.

There, Chambers' complicity ends. From that point forward, everything that was done in this case was done by counsel — Chambers himself made no decision with regard to the course of the litigation. The attorneys, not Chambers, reacted and told him when and how to act in this matter. Even the contempt citation issued against Chambers, to which NASCO points as evidence of Chambers' incorrigible recalcitrance, was leveled at conduct that was performed only upon the advice of his lawyers, although the district court found that fact was not a defense. *See NASCO, Inc. v. Calcasieu Television and Radio, Inc.*, 583 F.Supp. 115, 120 (W.D.La. 1984).[1]

[1] NASCO contends that two other pieces of conduct prove that Chambers was the "principal conspirator:" his "concocting" of the Public Records Doctrine defense, and his "fabrication" of testimony and documents. Resp. Br. 29. But, no one has *ever* contended that Chambers conceived the Public Records Doctrine defense. In fact, the evidence (continued)



For his complicity, Chambers has paid, and handsomely too.[2] NASCO was paid $850,000 to compensate it for the delayed performance, an amount which it accepted in settlement as adequate and commensurate to its damage. No more is permitted by Louisiana law. *See* La. Civ. Code Art. 1986. Louisiana law simply will not tolerate an additional award of attorneys' fees to NASCO, despite the fact that Chambers' breach of contract may have been found to be in utter "bad faith.[3]"

## ARGUMENT

### I. THERE IS NO INHERENT POWER TO SHIFT THE BURDEN OF ATTORNEYS' FEES FOR ABUSE OF PROCESS OTHER THAN UNDER THE "BAD FAITH" EXCEPTION.

NASCO's entire argument in this case stems from the faulty premise that there is an "inherent power" in the courts to shift the entire burden of attorneys' fees for "abuse of process" and for "vindicating judicial authority" that is devoid of any substantive ramifications. By invok-

(Footnote 1 continued)

establishes without contradiction that he was skeptical of its validity until convinced otherwise by his attorneys. As to the false evidence, NASCO introduced that evidence into this case over the strenuous objection of Chambers' counsel, who sought to keep it out on the grounds of its irrelevancy! 39R59-60.

[2] In addition to the station assets themselves, NASCO received free of charge and without adjustment of the purchase price millions of dollars in station improvements that had been installed during the progress of the lawsuit. Moreover, it suffered no risk and had no investment. The burden of maintaining the station and fulfilling F.C.C. requirements was by law at all times solely Chambers' responsibility. The only money that NASCO "invested" was the initial $900,000 in earnest money it had deposited to secure the purchase agreement, which Chambers had allowed to be returned when he objected to the sale.

[3] A full discussion of Louisiana law in this regard is contained at pages 13 - 15 of Chambers' Original Brief in the Court of Appeal.

ing the substantive/procedural distinction,[4] and suggesting that use of "inherent power" fits comfortably within the latter half of that dichotomy, NASCO and the Court of Appeal seek to avoid any limitation that *Erie* might place upon the shifting of attorneys' fees due to bad faith conduct in a diversity case.

NASCO's theory, at least as it relates to attorneys' fees, was rejected by this Court in *Alyeska Pipeline Services v. Wilderness Society,* 421 U.S. 240 (1975), when it held that federal courts do not possess an "inherent power" to shift the entire burden of attorneys' fees. The reallocation of the burdens of litigation is a matter particularly within the legislative sphere.[5] There is no "roving authority" for the federal bench to assess attorneys' fees "whenever the courts might deem them warranted." *Id.*, at 260. Absent a contractual or statutory provision to the contrary, courts are constrained to follow the General American Rule that each party is to bear his or her own attorneys' fees. In recognizing "bad faith" conduct as creating an exception to this Rule, this Court specifically relied upon the common law equitable origins of awarding attorneys' fees for vexatious conduct, and the tacit approval given by Congress to the practice. *Id.*, at 259-60.

While *Alyeska* did not involve an attempt to shift attorneys' fees on the grounds of abuse of process,[6] this Court's decision in *Roadway Express, Inc. v. Piper,* 447

[4] The terms "substance" and "procedure" describe very little except a dichotomy. The line between them varies from context to context, *Sun Oil Co. v. Wortman,* 486 U.S. 717, 726 (1988), and "might sometimes prove elusive." *Miller v. Florida,* 482 U.S. 423, 433 (1987).

[5] Just last term, this Court is *Kaiser Aluminum & Chem. Co. v. Bonjorno,* 110 S.Ct. 1570, 1576 (1990), relying on *Alyeska,* reiterated that "the allocation of the costs accruing from litigation is a matter for the legislature, not the courts."

[6] *Amicus curiae's* brief in *Business Guides, Inc. v. Chromatic Communications Enterprise, Inc. and Michael Shipp.,* No. 89-1500 on the docket of this Court, contains an excellent dissertation on why *Alyeksa* and the Rules Enabling Act constrain a court's "inherent power" to award attorneys' fees, even on procedural grounds. *See also* Burbank,

(continued)



U.S. 752 (1980), made clear that any "inherent power" in the court to act against abuse, if it involved the shifting of the entire burden of attorneys' fees, was constrained by the General American Rule. An award of attorneys' fees, even as a "sanction" for abuse of process, could not be imposed except through use of the common law *equitable* power to award attorneys' fees that is at the root of the "bad faith" exception. *Id.*, at 767.

Lacking any other authority for the existence of an "inherent power" to shift the burden of attorneys' fees on procedural grounds, NASCO attempts to expand the courts' inherent *equitable* power to award attorneys' fees under the "bad faith" exception into a broader inherent power to shift attorneys' fees to remedy "abuse of process," a phrase no doubt selected for its procedural tone and which becomes the theme of NASCO's entire brief. To do this, NASCO suggests, without citation to authority, that, "the authority to award attorneys' fees for abuses of the judicial process is part of a larger array of inherent judicial powers that includes the power to: hold a party in contempt, discipline attorneys, conduct independent investigations to determine if fraud has been perpetrated on the court, dismiss a case *sua sponte,* remove disruptive litigants, and enjoin the filing of repeated, frivolous *in forma pauperis* petitions." Resp. Br. 16 (citations omitted).

The fallacy in this argument is that it fails to recognize that there are different grades of "inherent power." NASCO assumes that there is an inherent power to shift attorneys' fees for abuse of process that is of the same magnitude as these other inherent powers because

(Footnote 6 continued)

*Sanctions in the Proposed Amendments to the Federal Rules of Civil Procedure: Some Questions About Power,* 11 Hofstra L. Rev. 997 (1983). Of particular interest is the discussion of recent legislative history (proposed amendments to Rule 68 and the 1988 amendment to the Rules of Decision Act) that demonstrates Congress' view that the question of attorneys' fees, even when awarded under a procedural mantle, is within its exclusive domain.

certain cases refer to the "bad faith exception" as an "inherent power" and, according to NASCO's reasoning, an inherent power is an inherent power is an inherent power.

But, this is not the case. For example, the power of this Court to declare a statute unconstitutional is an "inherent power" of the highest order because it is part and parcel of this Court's constitutional mission. *Eash v. Riggins,* 757 F.2d 557, 562-63 (3rd Cir. 1985). This power is always available and cannot be abridged, even by act of Congress. *Marbury v. Madison,* 5 U.S. (1 Crance) 137 (1803). Certain other powers, such as contempt, dismissal of claims, or injunction, may be inherent because of their necessity for a court to act as a court. These powers may be subject to legislative regulation, but they cannot be denied. Yet still, there are some powers that are "inherent" only in the sense that they are "highly useful" in the pursuit of a just and equitable result. They exist only in the absence of contrary legislative directive. *Eash v. Riggins, supra,* at 563.

The power to shift the burden of attorneys' fees under the "bad faith" exception belongs to this last category. First, the "bad faith" exception could be eliminated by the legislature at any time. *Alyeska Pipeline Services v. Wilderness Society, supra,* at 259-60. Moreover, the "bad faith" exception is "necessary" only in the sense that it grants the court power to pursue a just result. *Eash v. Riggins, supra,* at 563. The very reason for the existence of the exception, and the grant of fees pursuant to it, is to do equity between the parties. In *Summit Valley Industries, Inc. v. Local 112, United Brotherhood of Carpenters and Joiners of America,* 456 U.S. 717, 721 (1982), this Court specifically referred to the "bad faith" exception as an "equitable exception" that was endorsed by the courts "where necessary to further the interests of justice." *See also Fleischmann Distilling Corporation v. Maier Brewing Co.,* 386 U.S. 714, 718 (1967) (common law equitable exceptions to General American Rule sanctioned when "overriding considerations of justice" compel such a



result). NASCO itself, citing *Weinberger v. Romero-Barcelo,* 456 U.S. 305, 313 (1982), concedes that the power "at issue here" is "an inherent *equitable* power." Resp. Br. at 19. Moreover, in *Hutto v. Finney,* 437 U.S. 678, 689 n. 14 (1978), relied upon so heavily by NASCO, this Court specifically noted that the power to award attorneys' fees "against a party who shows bad faith by delaying or disrupting the litigation process" belonged to "an equity court." Such an award vindicates judicial authority and "makes the prevailing party whole for expenses caused by his opponent's obstinacy." *Id.* These expressions of the purpose of the "bad faith" exception are consistent with its origin as an equitable remedy available to the Chancery Courts. *Hall v. Cole,* 412 U.S. 1, 5 (1973).[7]

No court has ever included the power to award attorneys' fees for "bad faith" conduct within the realm of those inherent powers that are "necessary to the exercise of all others" or "necessary to permit the courts to function," *Roadway Express v. Piper, supra,* at 764; *Young v. United States ex rel. Vuitton et Fils, S.A.,* 481 U.S. 787, 819 (1987) (Scalia, J., concurring), as does NASCO in order to elevate the power to one that would appear immune from *Erie* concerns. The "bad faith" exception, which is the courts' only "inherent power" to shift the burden of attorneys' fees, is not a matter of functional necessity, as held by the Court of Appeal. Pet. App. A-69. *Roadway Express, Inc. v. Piper, supra,* certainly suggests that the ability to shift attorneys' fees is not "inherent" in the sense of being "necessary," since it is constrained by the General American Rule.

NASCO does not offer any real explanation for why the "inherent power" to shift the entire burden of

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[7] Indeed, the case usually referred to as the seminal case on the subject, *Vaughan v. Atkinson,* 369 U.S. 527, 82 S.Ct. 997 (1962), and which perhaps expanded the remedy to all types of actions, announced the existence of the power by finding that "counsel fees have been awarded in equity actions" and "equity is no stranger to admiralty." *Id.,* at 530.

attorneys' fees for abuse of process should be viewed as "necessary," especially given the panoply of express powers that courts have been imbued with of late, as well as the inherent power to discipline errant counsel or redress *specific* litigant abuses. *See* Pet. Br. 19 n.3, 22 n.5, 24 n.6. NASCO's only argument, that the power to shift the entire burden of attorneys' fees is "necessary" because "nothing else . . . covers the same landscape," Resp. Br. at 20, entirely misses the point. It is true that the express and presently recognized inherent powers that courts possess may not afford courts the power to effect a massive post-trial shift in the entire burden of attorneys' fees, but to say that courts lack the power to traverse that uncharted terrain does not mean that they *need* to in order to be protected from abuse. NASCO cannot suggest one specific *procedural* abuse that falls outside the scope of the express sanction powers.[8] Nor does it bother to rebut the contention that the presently recognized sanction powers, if utilized swiftly to remedy specific transgressions at the time of their occurrence, better arm the courts to remedy specific abuses and deter future abuse, thereby reducing the vexation of "bad faith" litigation and the ultimate amount of attorneys' fees incurred as a result of it.[9]

[8] NASCO's suggestion that Rule 11's focus on "pleadings, motions and other papers" reflects a "narrow" concern is mystifying, since it is hard to conceive of a *procedural* abuse that could be effected without the use of pleadings or other papers. NASCO's argument that the conduct at issue in this case was beyond the reach of Rule 11 only proves that what is really at issue here is Chambers' bad faith breach of contract, not any litigation abuse that might have occurred. NASCO all but admitted that fact in its Opposition to Writs where it stated at page 6 note 3 that the "malefaction" for which Chambers is being punished was beyond the reach of Rule 11 because it "did not involve the signing of papers filed in conjunction with this litigation."

[9] The facts of this case are certainly no counter to the argument, since the trial court did not even attempt to utilize the myriad express powers available to it during the course of litigation, with the sole exception of one contempt citation. In every case of perceived abuse, the court found warnings to be adequate for its purpose. Only sixteen months after the case was ended, on the suggestion of the Court of Appeal, did the trial court feel the need to vindicate its authority. Given these facts, the

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The point is not that the express powers supplant the "bad faith" exception — it is that the two address a different set of concerns.[10] The express powers are Patriots aimed directly at abuses of the courts' process, and as such they offer the best hope of both immediate remedy and deterrence. The "bad faith" exception does not offer the same hope, nor was it conceived to. It offers equitable compensation to a party injured by the other's unchecked vexatious and oppressive conduct. Therefore, it seems more than odd to attempt to justify a fee shift through the exercise of a courts' inherent powers for procedural abuses when those abuses were allowed to accumulate unchecked by the available express powers. Since inherent powers are "shielded from direct democratic controls" and are only those "necessary" to the exercise of all others, *Roadway Express, Inc. v. Piper, supra*, at 764, it is only logical to require a court to attempt to combat procedural abuses with the express powers available to it before allowing invocation of the inherent power to shift the entire burden of attorneys' fees on the grounds of procedural abuse. *Cf. Young v. United States ex rel. Vuitton et fils, S.A., supra*, at 788 (It should be "ensured" that "courts will exercise their inherent power of self-protection only as a last resort.").

Moreover, invocation of the "inherent power" of the court to grant a massive retrospective, retaliatory shift of attorneys' fees, while perhaps serving the substantive goal of equitable compensation to the injured litigant, does little to further the goal of deterrence that is at the heart of

(Footnote 9 continued)

Court of Appeal's suggestion that the use of inherent power in this case was "an effort to *control* the litigation," Pet. App. A-77, litigation that was long over, is bizarre.

[10] NASCO's contention that any argument that the two are "co-extensive" is "senseless on its face", Resp Br. 18, may be correct, but Chambers never argued that they were. Chambers has always contended that the inherent power to shift the full burden of attorneys' fees is not "co-extensive" with the express sanction powers because the former necessarily includes reimbursement for some nonsanctionable conduct within its overinclusive reach.

the sanctions power. Such a fee shift is actually a counter-productive method of enforcing the rules of litigation conduct, achieving deterrence, and sanctioning specific transgressions, all of which are at the heart of protecting a court from "abuse of process" and "vindicating its authority." There are certain principles that must be followed to ensure that a sanction achieves its maximum and desired result, without any unwanted side effects such as chilling legitimate zealous advocacy.[11] Chambers laid these out in his brief, and cited the applicable jurisprudence to that effect. To that vast body of law must be added two new welcome additions: *In re Kunstler,* 914 F.2d 505 (4th Cir. 1990), and *White v. General Motors Corp., Inc.,* 908 F.2d 675 (10th Cir. 1990). The point of this discussion was that, when gauged by all of the rules that have developed regarding "sanctions," a massive, post-trial shift of attorneys' fees falls short. It is not a good way to achieve the goals of sanctions; it is only a good way to provide maximum compensation to an injured party.

Without ever coming to grips with this argument, NASCO retorts that, in this case, the district court did not abuse its discretion in imposing $1,000,000 in sanctions. NASCO argues that there is nothing wrong with a massive post-trial shift in attorneys' fees,[12] or that it include compensation for conduct that did not occur before the issuing court.[13] NASCO argues that such an award need not be

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[11] One need only read the commentary, *Sanctions Standards Still Murky,* 77 ABA Journal 84 (Jan. 1991), to discern the confusion and fear among the bar that the award at issue has generated.

[12] NASCO's attempt to justify the fact that the fee award made in this case was made more than a year after the conclusion of trial on the merits completely ignores the fact that the award was made after final appeal as well — for all purposes, this case was "over" until the trial court decided that its authority needed vindicating sixteen months after its work was done.

[13] NASCO's argument that it is permissible to include compensation for fees incurred as a result of extra-judicial conduct appears to contradict its position that every single penny of attorneys' fees incurred in this case was a result of abuse of the judicial process. Moreover, it complete-

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granted with the reasonable specificity that is required of other attorneys' fee awards,[14] that it be personalized,[15] or that it exclude reimbursement for fees that were incurred due to a failure to mitigate.[16] All of this might be true if the ultimate goal desired is full compensation; but the authorities cited by Chambers in his original brief make it amply clear that these requirements are integral to any effective plan to police against judicial abuse.

It is perhaps for these reasons that the ability of a

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(Footnote 13 continued)

ly ignores the fact that it was beyond the province of the district court to sanction conduct that occurred before the Court of Appeal, before this Court, and before administrative agencies.

[14] NASCO's suggestion that its failure to maintain time records is excusable because it did not know in advance it would need them, Resp. Br. 29 n.19, is incorrect. Adequate time records should be kept for reasons other than simply for sanction purposes. In any event, when the amount of a monetary sanction is large and based upon fee statements, adequate detail must be supplied so that the "reasonableness" of the sanction can be scrutinized. *In re Kunstler, supra,* at 523-24. Only then can the presence of such mitigating factors as, for example, attorney overstaffing, be revealed. *White v. General Motors Corp., Inc., supra,* at 686.

[15] While NASCO repeats (without providing any citation to the record to support the conclusion) the trial court's finding that Chambers personally was responsible for every procedural abuse in this case, NASCO fails to explain why Chambers should shoulder the entire monetary burden. The trial court did not find that he acted alone. Joint liability would therefore seem appropriate. *See e.g., White v. General Motors Corp., Inc., supra,* at 685-66.

[16] NASCO's suggestion that every penny of $1,000,000 attorneys' fees was "necessarily" incurred to defeat a defense so spurious that every single element of it constituted an abuse of the judicial process is preposterous. *See e.g., White v. General Motors Corp., Inc., supra,* at 908 ("It is difficult to imagine how GM could have reasonably incurred $172,382.19 attorneys' fees in ridding itself of this frivolous suit on summary judgment."). NASCO's claim that it could not obtain summary judgment in this case because Chambers "falsely claimed there were factual disputes," Resp. Br. 28, is simply incorrect. NASCO did not call a single witness at trial to rebut any of the facts adduced by Chambers. This case was decided as a matter of law on the undisputed facts, making it a perfect candidate for summary judgment.

court to shift the entire burden of attorneys' fees has never been considered an "inherent power" in the traditional or classic sense of that term. In *Roadway Express, Inc. v. Piper, supra*, this Court expressly held that any "inherent power" that a court might possess to award attorneys' fees is limited by the General American Rule. NASCO and the Court of Appeal have confused the "bad faith" exception to that Rule, which is "unquestioned," *Hall v. Cole, supra*, in the sense that Congress has never interfered with its application and thus has tacitly approved it, *Alyeska Pipeline Services v. Wilderness Society, supra*, at 259-60, with those monolithic inherent powers that "exist to protect the interests of a court *quo* court," and thus might fall outside the scope of the Rules of Decision Act, 28 U.S.C. § 1652. Resp. Br. 13. While courts plainly have the inherent power to regulate the *process* of litigation, that power is still constrained by principles of separation of powers and by the limits of what is actually *necessary* to regulate the conduct of practice before the federal courts. The "inherent power" to shift the entire burden of attorneys' fees has been held to run afoul of Congress' power to allocate the risks and burdens of litigation, *Alyeska Pipeline Services, Inc. v. Wilderness Society, supra*, and has never been held to be "necessary" for the effective operation of the courts.

## II. THE "BAD FAITH" EXCEPTION IS NOT AVAILABLE IN THIS DIVERSITY CASE.

The "inherent power" of a court to award attorneys' fees under the "bad faith" exception is no more than the law-making power of a court sitting in equity to do justice between the parties. That is the origin of the exception, and, just as any other equitable remedy, such judge-made law may be circumscribed by the legislature. In a diversity suit, the circumscription to "judge made law" is found in the Rules of Decision Act, 28 U.S.C. § 1652, which requires that, under *Erie* conditions, state law on the subject be respected. *Stewart Organization, Inc. v. Ricoh Corporation*, 487 U.S. 22, 27 n.6 (1988). *See also Boyle v. United*



*Technologies*, 487 U.S. 500, 517 (1988). ("Federal common law can displace state law in 'few and restricted' instances."); *Bundinich v. Becton Dickinson and Co.*, 486 U.S. 196, 198 (1988) ("state law generally supplies the rules of decision in federal diversity cases").[17]

This Court found that *Erie* was triggered and applicable to awards of attorneys' fees under the "bad faith" exception in *Alyeska Pipeline Services, Inc. v. Wilderness Society, supra*, at 259 n.31. Its holding rested on firm ground, considering the "outcome-determination" test of *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945), and the "twin-aims" dicta in *Hanna v. Plummer*, 380 U.S. 460 (1965). There is no doubt that an award of attorneys' fees under the "bad faith" exception is "outcome determinative."[18] The award has a "clear and undeniable effect on the monetary outcome of a suit." *Jarvis v. Johnson*, 668 F.2d 740, 745 (3rd Cir. 1982). The threat of liability for attorneys' fees for "bad faith" litigation certainly has the great potential for altering the "character and result" of the litigation, as well as the "fortunes" of the litigants, which is the root concern of the "forum shopping" leg of the "twin aims" of *Erie*. *Hanna v. Plummer, supra*, 380 U.S. at 468 n.9. In a discreet class of cases, those in which either the claim or defense is marginal, there would be real reason to avoid federal court and try one's hand in a state court that does not recognize the "bad faith" exception. The other leg of the "twin-aims" is also at play,[19] since it is certainly unfair to allow a

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[17] In this case, the award granted by the district court is contrary to the controlling state law. As the Court of Appeal found, Louisiana only allows attorneys' fees when authorized by statute or contract. "It does not recognize an exception for bad faith practice." Pet. App. A-67.

[18] Even the Court of Appeal had to admit that fact in its opinion. Pet. App. A-77. ("Of course, use of inherent power is outcome determinative in the sense that Chambers owes fees he would not have owed had Louisiana law applied. . . .").

[19] *Walker v. Armco Steel Corporation*, 446 U.S. 740, 752, 100 S.Ct. 1978, 1986 (1980), made clear application of state law was warranted by

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nonresident plaintiff to subject a resident defendant to the possibility of being cast for attorneys' fees when his next door neighbor would be immune from such an award if sued by a co-citizen. Ely, *The Irrepressible Myth of Erie*, 87 Harv. L. Rev. 693, 712 (1974). "The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result." *Guaranty Trust Co. v. York, supra*, at 108.[20]

Neither NASCO nor the Court of Appeal felt constrained to follow either Louisiana law or the mountain of precedent that commands its application.[21] Instead, they assert that the "inherent power" to shift the burden of attorneys' fees for "abuse of process" cannot trigger *Erie* concerns because it is purely procedural, a matter in which only the forum court has an interest.

No authority is cited in support of this position. NASCO resorts to the "balancing" test announced by this Court in *Byrd v. Blue Ridge Rural Elec. Co-op.*, 356 U.S. 525 (1958), and claims that such a test is a "settled principle" of *Erie* analysis. Resp. Br. 21.[22] However, it has been

(Footnote 19 continued)

the fulfillment of only *one* of *Erie's* "twin aims."

20 NASCO's contention is that *Erie's* "twin aims" are not offended by application of the federal "bad faith" exception because it is "party neutral," treating plaintiffs and defendants alike and applying equally to citizens and noncitizens, Resp. Br., 14, 22-23, is disingenuous at best. *Erie's* concern is not whether plaintiffs or defendants, or "in-staters" or "out-of-staters" are favored, but rather that a plaintiff or defendant citizen receive the same treatment in federal court against a non-citizen as his co-citizen receives in state court against either a citizen or a non-citizen. "Certainly, the fortuitous circumstance of residence out of State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident." *Guaranty Trust Co. v. York, supra*, at 112.

21 "[S]tare decisis is a cornerstone of our legal system. . . ." *Webster v. Reproductive Health Services*, 109 S.Ct. 3040, 3056 (1989).

22 NASCO also cites some language from *Hanna v. Plummer, supra*, as (continued)



universally recognized that *Byrd's* balancing approach was rejected by *Hanna v. Plummer*, which returned to and refined the outcome-determination approach of *York*. Ely, *supra*, at 696; Braman and Neumann, *The Still Unrepressed Myth of Erie*, 18 U. Balt. L. Rev. 404, 414 n.65; Redish & Phillips, *Erie and the Rules of Decision Act: In Search of the Appropriate Dilemma*, 91 Harv. L. Rev. 356, 369 n.4 (1977). As one commentator noted:

> Apparently abandoned [in Hanna] . . . is the notion derived from *Byrd* by several courts and commentators that competing state and federal practices must be balanced and that state practice can be permitted to prevail only when it is 'bound up with the definition of the rights and obligations of the parties.'

Miller, *Federal Rule 44.1 and the "Fact" Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 Mich. L. Rev. 613, 714-15 (1967).[23]

NASCO's argument is simply incorrect. The purpose of a fee shift under the "bad faith" exception has always

(Footnote 22 continued)

holding that *Erie* can be ignored in "matters which relate to the administration of legal proceedings" because of "affirmative countervailing [federal] considerations." Resp. Br. at 22. However, the language is taken completely out of context. When not so abused, the passage is readily seen as indicating that *Erie* constraints do not apply when the question at hand involves the applicability of a Federal Rule, such as Rule 11. The test in that case is whether the Rule is constitutional and within the authority granted under the Rules Enabling Act. *Hanna v. Plummer, supra*, at 472-74. NASCO's confusion about *Hanna* explains the curious argument made in note 13 of its brief. *See* Pet. Br. 28 n.10.

23 In any event, Louisiana has a strong policy against awarding attorneys' fees under the "inherent power" of the court for "bad faith" conduct. The underlying rationale of such an award is punitive. *Hall v. Cole, supra*, at 5. Likewise, Louisiana law construes any award of attorneys' fees as essentially punitive in nature. *Frank K. Beier Radio, Inc. v. Black Gold Marine, Inc.*, 449 So.2d 1014, 1016 (La. 1984). But, Louisiana law strictly forbids punitive damages. *Baggett v. Richardson*, 473 F.2d 863, 865 (5th Cir. 1973).

been compensatory. It is a legacy of the Chancery Court's power to do justice between the parties. That the award of attorneys' fees under the "bad faith" exception may have the concomitant side effect of "vindicating judicial authority" does not detract from its central thrust, which is essentially compensatory.[24] The exception has, at its core, the substantive goal of preventing a litigant from enriching himself by engaging in "bad faith" conduct at the expense of his innocent adversary, a goal which is something more than merely improving the process by which lawsuits are conducted.

Moreover, NASCO's argument turns *Erie* analysis on its head. It *assumes* that the relevant fact in determining whether a particular rule to be applied is a "rule of decision" is the *motive* of the court in invoking that rule (to promote a procedural goal or to achieve a substantive one), rather than the effect that the rule has in terms of "outcome-determination" or the "twin-aims" of *Erie*. That assumption is wrong.

> [T]he question is not whether a [rule] is deemed a matter of "procedure" in some sense. The question is . . . does it significantly affect the result of a litigation for a federal court to disregard a law of a State that would be controlling in an action upon the same claim by the same parties in a State Court?

*Hanna v. Plummer, supra,* at 466.

Finally, NASCO and the Court of Appeal's argument draws a fanciful and hypothetical distinction between "bad

[24] While contending that the "sole" purpose of the award at issue in this case was to protect the "court *quo* court," NASCO was forced to admit that this Court recognized in *Hutto v. Finely, supra,* that an award under the "equity court's power" to invoke the "bad faith" exception "vindicates judicial authority . . . *and* makes the prevailing party whole for expenses caused by his opponent's obstinacy." *Id.*, at 678 n.14, 98 S.Ct. at 2573 n. 14. The two are certainly not mutually exclusive. *Cf. Juidice v. Vail,* 430 U.S. 327, 335-336 & n.12 (1977).



faith" in the conduct of litigation itself (which is "classically procedural", Resp. Br. at 24), and "bad faith" in the assertion of a claim or defense or in the conduct that leads to the litigation (which "quickly implicates state choices of policy," Pet. App. A-76, and is thus presumably substantive enough to be the object of *Erie's* concern). No shift of the entire burden of attorneys' fees in a lawsuit could be predicated *solely* on the "classically procedural." No matter how vexatious the litigation conduct of a party, his adversary will incur attorneys' fees, perhaps substantial charges, that "are not intimately related to the mechanics of the litigation." *Hutto v. Finney, supra,* at 707 (Powell, Jr. concurring). This statement can only be refuted by expanding the scope of "bad faith litigation conduct" to include conduct the legitimacy of which is measured by the substantive law, and is therefore not "classically procedural."

This case is a perfect example. While the Court of Appeal has chosen to define "litigation conduct" as including all the grounds upon which the attorneys' fee award at issue was based, a review of those grounds reveals that they are rife with the exact same "federal measuring" of claims and defenses that "quickly implicates state choices of policy." Pet. App. A-76. Consider the major ground, the "fraud" perpetrated on the court in an attempt to deprive it of "jurisdiction" through the confection of the Public Records Doctrine defense engineered by Gray. Resp. Br. 21 n. 12. In an obvious attempt to direct Chambers' and Gray's conduct at the court, NASCO has described what transpired with "procedural" sounding words — words that conjure abuses of process of the vilest kind. But, the transfer of the assets to Mabel Baker was not a procedural abuse (nor was it "litigation conduct" since it occurred before the lawsuit was filed, Pet. App. A-61). No "fraud" was committed on the court. *See Addington v. Farmer's Elevator Mutual Insurance Company,* 650 F.2d 663, 668 (5th Cir. 1981), *cert. denied,* 454 U.S. 1098 (1981) (even perjury and failure to disclose do not constitute a fraud upon the court because they do not "subvert" the "integrity of

the judicial process" in a "manner involving more than an injury to a single litigant.") Nor was there any attempt to deprive the court of "jurisdiction" over the assets, which could only have been accomplished if Chambers had removed them from the country. *Cf. National Forest Preservation Group v. Butz*, 485 F.2d 408, 410 (9th Cir. 1973) (argument that transfer of lands pending appeal on denial of injunction placed the lands beyond the jurisdiction of the court termed "nonsense.").[25] Despite all of the procedural ghosts that NASCO tries to summon, at issue here is a bad faith breach of contract, and Chambers' desire to have what turned out to be a meritless legal theory tested in federal court. "Clearly, the exercise of one's legal rights to have a dispute resolved in Federal Court is not an abuse of the judicial process." *Indianapolis Colts v. Mayor and City Council*, 775 F.2d 177, 182 (7th Cir. 1985). Awarding attorneys' fees on the basis of that conduct, even through throwing a procedural cloak about it, is precisely the kind of "federal measuring" that "quickly implicates state choices of policy," Pet. App. A-76. The same is true for the other " procedural abuses" alleged to have been committed by Chambers, which all revolve essentially around the fact that the defenses asserted on his behalf by Gray were all found to be specious.[26] Whether all of this conduct is penned "litigation conduct" or otherwise, awarding attorneys' fees because of it surely has the potential to materially alter the "character or result" of the litigation. *Hanna v. Plummer, supra*, at 467. Under *Erie* and *Hanna*, such a federal shaping of a state substantive right is unwarranted. *Montgomery & Co. v. Pacific Indemnity Co.*, at 557 F.2d 51, at 58 n.9 (3rd Cir. 1977).

[25] Gray's decision to confect the Public Records Doctrine defense after receiving notice that NASCO would seek a TRO is likewise not a procedural abuse. It merely placed the conduct "at his peril and subject to the power of the court to restore the status quo. . . ." *Jones v. SEC*. 298 U.S. 1, 18 (1936).

[26] "Excessive discovery requests, which were complained of in this case, also seem peculiarly the province of lawyers." *White v. General Motors, Corp., Inc., supra*, at 686.



## CONCLUSION

NASCO asserts that Chambers' suggestion that this case is inappropriate for a remand is "nonsense." Impossibility is not "nonsense." NASCO has stated that it is impossible to supply the type of time records that would be necessary to conduct the detailed analysis that would be required to sanction Chambers under the court's express powers. J.A. 132.[27] NASCO now asks this Court to remand the case so that it can produce the records that it refused to produce previously on the ground of "impossibility." Moreover, the trial court has already examined the conduct at issue in light of its express powers, and found Rule 11 inadequate to vindicate its authority. Pet. App. A-41.[28] The district court's error in grounding its decision on its "inherent power" is an error attributable to NASCO (who prayed that the court invoke that power so that it could be reimbursed the entirety of its attorneys' fees), not Chambers. Under these unique circumstances, Chambers respectfully suggests that a remand is not due.

[27] The same constraint should have prevented the district court's assessing attorneys' fees under the "bad faith" exception. *Coleman-Worthington Productions v. Schuller*, 914 F.2d 1496 (9th Cir. 1990); *Sidag Aktiengesellschaft v. Smoked Food Products Company, Inc.*, 854 F.2d 799 (5th Cir. 1988).

[28] This is not to say that Rule 11, or any of the other available express powers or even several of the inherent powers (such as dismissal of claims, contempt, or limited fees and expenses) properly invoked at the time specific violations of the rules of conduct occurred, would not have been more than adequate to protect the court from abuse.

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